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In The

# Supreme Court of the United States

THE STATE OF MISSISSIPPI,

*Petitioner,*

v.

THE CITY OF MEMPHIS, TENNESSEE,
MEMPHIS LIGHT, GAS & WATER DIVISION,
AND THE STATE OF TENNESSEE,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Whether ground water residing within the boundaries of the State of Mississippi at the time it entered the Union, which did not under natural circumstances flow into the State of Tennessee, constitutes a natural resource over which the State of Mississippi holds the rights of a sovereign, making the doctrine of equitable apportionment inapplicable.

Whether an action filed by the State of Mississippi solely against the City of Memphis, Tennessee and its public utility for compensation for the wrongful extraction of Mississippi ground water through the use of artificial, mechanical means, constitutes a suit by one state against another state triggering the exclusive jurisdiction of this Court under U.S. Const. Art. III, Section 2 and 28 U.S.C. Section 1251(a).

Whether the Fifth Circuit decision affirming the District Court's order requiring the joinder of the State of Tennessee as a necessary party in the suit against the City of Memphis, Tennessee and its utility division conflicts with the decisions of the Supreme Court and the Eleventh and Eighth Circuits governing application of 28 U.S.C. Section 1251(a).

## RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the lower court whose judgment is the subject of this petition is as follows:

*Plaintiff-Appellant and Petitioner*: The State of Mississippi

*Defendants-Appellees and Respondents*: The City of Memphis, Tennessee and Memphis Light, Gas & Water Division

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## PETITION FOR A WRIT OF CERTIORARI

Mississippi respectfully petitions for a Writ of Certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The unpublished opinion of the U.S. Court of Appeals for the Fifth Circuit, dated June 5, 2009, and its judgment, dated June 29, 2009, are reproduced at App. A, 1a - 18a.

The Bench Opinion Dismissing Action Without Prejudice of the U.S. District Court for the Northern District of Mississippi, Delta Division, dated February 4, 2008, is officially reported at 533 F. Supp.2d 646 (N.D. Miss. 2008) and is reproduced at App. B, 19a - 29a.

## JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit sought to be reviewed was entered on June 5, 2009. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1 and Rule 13.3 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1254(1).

For purposes of Supreme Court Rule 14.1(g)(ii), the Court of first instance had federal question jurisdiction under 28 U.S.C. §1331.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are Article III, Section 2 of the United States Constitution; 28 U.S.C. Section1251; and Mississippi Code Annotated Section 51-3-1 (2008). Pursuant to Supreme Court Rules 14.1(f) & (i)(v), the relevant constitutional and statutory provisions are reproduced verbatim at App. F, 39a - 42a.

## STATEMENT OF THE CASE

### *PREAMBLE*

The State of Mississippi ("Mississippi") requests this Court's review and reversal of the Fifth Circuit's opinion and judgment, App. A. In the event this Court does not grant Mississippi's petition and reverse the Fifth Circuit on the questions presented for review, then Mississippi requests this Court to review and grant Mississippi's Motion for Leave to File Bill of Complaint in Original Action filed contemporaneously herewith.

### I. BACKGROUND FACTS AND ISSUES

On December 10, 1817, Mississippi was admitted to the Union on an equal footing with the original thirteen colonies, retaining all attributes of sovereignty not ceded to the federal government in the United States Constitution. On admission to the Union the federal government transferred title to all land within the state borders and to the natural resources above and below the surface of that land, except to the extent expressly reserved by the United States. It is

well established that one of the attributes of sovereignty retained by the states is the power to preserve, protect and regulate the use of all natural resources found within the states' established borders.

This action arises from the wrongful taking and conversion of a natural resource over which Mississippi holds sovereign authority under the Constitution and Laws of the United States: ground water contained within a deep confined aquifer which, under natural conditions, has resided within the territorial boundaries of Mississippi since long before the drawing of state lines. This ground water is not a naturally shared resource, but one which has been confined within Mississippi's boundaries by the geology of the Sparta or Memphis Sand Aquifer ("the aquifer") in which this finite supply of prehistoric water naturally resides. Under north Mississippi, the aquifer is a deep confined geological formation of limited permeability consisting of dense sand, rock, silt and clay sandwiched between two separate clay formations. The ground water stored in this aquifer accumulated over millennia as it slowly filtered imperceptibly through soil, sediment and rocks to deposit a finite supply of pure water naturally entrapped and residing for thousands of years between the two confining clay strata above and below the deep aquifer sand formation.

Unlike the surface water of watersheds, streams, rivers and lakes which is constantly replenished and flows freely from place to place, the ground water in the aquifer beneath Mississippi is a pure finite resource, and only arduously moves under natural conditions. Once collected in the deep confined aquifer the accumulated ground water does not move freely or

randomly; rather, its movement is restricted by the porosity and surface friction of the constituents of the geology and the direction is determined by the geologic formation of the confining clays. In north Mississippi this geology has always restricted both the introduction of new water into the aquifer, and the natural movement of the finite supply of ground water contained in the aquifer. Ground water extracted from the aquifer in Mississippi takes thousands of years to replenish; and, under natural conditions, the ground water stored in the aquifer only moves about an inch per day, or 30.4 feet per year across north Mississippi in a predominately east to west direction. App., 44a-45a. These forces created an essentially static reserve of pure water which has resided within the present boundaries of Mississippi for thousands of years. The same geological factors created a similar finite, confined reserve of ground water beneath the western part of the State of Tennessee ("Tennessee").

With the growth of the City of Memphis ("Memphis"), it has authorized its wholly owned division, Memphis Light, Gas & Water ("MLGW"), to construct and operate an increasingly larger and larger water well pumping operation withdrawing water from the aquifer to the point that MLGW now boasts that it operates one of the largest water well pumping operations in the world, consisting of over one hundred seventy-five wells pumping from ten separate well fields drawing from the aquifer. App. 52a-53a. In its constant expansion of its water well pumping operation MLGW has located three of its ten fields very near the Mississippi state border. From these ten fields, MLGW pumps more than two hundred million gallons of ground water daily. This aggressive extraction of ground water by Memphis and

MLGW from the aquifer has largely drained the aquifer under Memphis and created a massive cone of depression within the aquifer extending across the Tennessee state line into Mississippi. By this mechanism, Memphis has siphoned hundreds of billions of gallons of irreplaceable pure water from within Mississippi which would never have crossed into Tennessee's borders in the Memphis area under natural conditions -- and it continues to do so. App., 46a - 51a. The Mississippi ground water being taken by Memphis and MLGW is being derived from an area of Mississippi which is rapidly growing and for which this resource is essential to sustain economic health and future residential and commercial development. This taking by Memphis and MLGW is intentional and they have taken no steps to cease or curtail their activities by which they continue to wrongfully seize over twenty-four million gallons of Mississippi ground water daily.[1]

Mississippi's action is not against Tennessee and the action does not involve a shared natural resource. Neither Mississippi nor Tennessee dispute the other states' sovereign right to control, protect and preserve the ground water naturally residing within their respective lawful boundaries and no such rights are at

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[1] For a more comprehensive discussion of the aquifer and the impact of MLGW's pumpage on Mississippi's ground water resources, *see* Affidavit of David A. Wiley (Professional Geologist) with excerpts from his expert report entitled "Report on Diversion of Ground Water from Northern Mississippi Due to Memphis-Area Wellfields" dated May 2007 annexed as Exhibit 2 to "Appendix G" at 56a-117a to Mississippi's Motion for Leave to File Bill of Complaint in Original Action filed contemporaneously with this petition.

issue in this action.[2] Mississippi's action is against Memphis and MLGW which effectively take the position that Memphis is free to seize and siphon away all the ground water it can extract from within Mississippi by mechanical means as long as its equipment does not physically cross the state line. Under these facts Mississippi has instituted an action against Memphis and MLGW for damages arising from the intentional and wrongful taking of a Mississippi natural resource to which Memphis has no claim of right, and to enjoin future diversions and the conversion of Mississippi's ground water.

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[2] Tennessee's *amicus curiae* brief in the Fifth Circuit appellate proceedings, essentially agreeing with Mississippi's positions regarding the states' ownership and control of all water resources within their separate borders, stated:

> Tennessee certainly has an interest as sovereign in the ground water *within its borders*. Like other natural resources, *the ground water in Tennessee* is held by the state in "public trust" for the use of the people of the state[.] Tenn. Code Ann. §69-3-102(a) (2004). As sovereign, Tennessee may exercise its police power to regulate ground water so as to protect and conserve the public resource. (emphasis, in italics, added).

See "Appendix I" at 235a to Mississippi's Motion for Leave to File Bill of Complaint in Original Action filed contemporaneously with this petition. While Mississippi acknowledges Tennessee's sovereign powers over its ground water, this dispute involves only ground water siphoned and diverted by Memphis' utility's pumping from within Mississippi's borders. No water resources under Tennessee's control are involved.

## II. DECISION OF THE DISTRICT COURT

On February 1, 2005, Mississippi sued Memphis and MLGW for monetary damages and injunctive relief for trespass and conversion of state-owned water resources. On three separate occasions, Defendants moved to dismiss the District Court action for lack of subject matter jurisdiction, arguing, *inter alia*, that Tennessee should be joined as an indispensable party-defendant and that such joinder would invoke the original and exclusive jurisdiction of the Supreme Court under 28 U.S.C. §1251(a). Each time, the District Court, relying in part on *Illinois v. Milwaukee*, 406 U.S. 91 (1972), denied Defendants' motions. App., 30a - 38a.

Trial was set for February 4, 2008. On the first day of trial, the District Court *sua sponte* revisited the issue of its subject matter jurisdiction. *See* App.,19a - 29a;, *Hood, ex rel. the State of Mississippi v. The City of Memphis, Tennessee*, 533 F. Supp.2d 646, 646-47 (N.D. Miss. 2008). The trial court held that, because the aquifer underlies parts of Mississippi and Tennessee, Mississippi's action "*must necessarily*" be an action "between two or more States" for purposes of 28 U.S.C. §1251(a). *Id.* at 650. The District Court found that it lacked subject matter jurisdiction and dismissed Mississippi's action without prejudice. *Id.* The District Court also determined that this Court must equitably apportion the aquifer as between Mississippi and Tennessee before the requested monetary damages may be awarded. *Id.* at 649.

## III. DECISION OF THE FIFTH CIRCUIT

Mississippi appealed the District Court's dismissal without prejudice to the U.S. Court of Appeals for the Fifth Circuit. On June 5, 2009, the Fifth Circuit, affirming the ruling of the District Court, equated the ground water suspended within a deep confined geologic formation with such clearly shared interstate resources such as rivers, lakes or streams, stating that "[t]he aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests." App., 11a. The Court of Appeals found no error in the District Court's conclusion that Tennessee's presence in the lawsuit was necessary to accord complete relief between Mississippi and Memphis. *Id.*

The Fifth Circuit acknowledged that Mississippi had correctly argued that a suit involving interstate water does not automatically invoke the jurisdiction of the Supreme Court and strip the District Court of jurisdiction. App., 12a. In fact, the Fifth Circuit noted that cases of concurrent jurisdiction (original, but not exclusive jurisdiction) under 28 U.S.C. §1251(b)(3) should be brought in the District Court in the first instance. The court below distinguished the authorities relied on by Mississippi as involving non-state parties, and not other states, despite the fact that Mississippi's action is also, and only, against non-state parties, Memphis and MLGW, not Tennessee. *Id.*

## REASONS FOR GRANTING THE PETITION

### I. THE FIFTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE DECISIONS OF THIS COURT REGARDING THE STATE'S SOVEREIGN AUTHORITY OVER NATURAL RESOURCES WITHIN ITS BORDERS

The Fifth Circuit's decision perpetuates the District Court's confusion between the Court's cases addressing the sovereign rights of a single state over natural resources residing *in situ* within its boundaries and those cases addressing the competing rights of multiple states asserting transitory claims to water naturally flowing through their territories. The equitable apportionment cases address only the latter classification, not the former; and the equitable apportionment remedy does not apply to Mississippi's case against Memphis and MLGW. This is true for at least three reasons: (a) the ground water residing within the aquifer in Mississippi is not a natural resource shared with another state; (b) there is no dispute between competing sovereigns holding legitimate claims to this ground water under the Constitution and Laws of the United States; and (c) equitable apportionment does not afford Mississippi a remedy for Memphis and MLGW's past wrongful conversion of Mississippi's natural resource.

#### A. The Mississippi Ground Water is Not a Shared Natural Resource Under *Martin v. Waddell's Lessee* (1842) and Its Progeny Covering One Hundred Sixty Years.

By affirming the District Court's decision, the Fifth Circuit implicitly adopted Memphis' argument that a

naturally limited and confined resource -- pure ground water accumulated in a deep confined aquifer residing within a state's boundaries -- cannot be owned, controlled, protected, preserved or regulated by that state. This argument finds no support in the Constitution and Laws of the United States under which this Court has repeatedly recognized the sovereignty of each state over the ownership, preservation, use and control of its natural resources for the benefit of its citizens. Under the equal footing doctrine, each state, upon entry into the Union, became vested with ownership, control and dominion over the natural resources within its territorial boundaries.[3] In *Phillips Petroleum Co. v. Mississippi*, this Court affirmed a decision of the Mississippi Supreme Court declaring the State's ownership and plenary authority over its subterranean resources. 484 U.S. at 476, 479 (affirming *Cinque Bambini Partnership v. State of Mississippi*, 491 So.2d 508, 511-14, 516-17 & 519-20 (1986) (effective upon statehood in 1817, federal law provided that the United States granted to Mississippi in trust all lands, to which the United States then held title, including their mineral, land and other subsurface resources)). Ever since the federal sovereign ceded title to Mississippi, state law

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[3] *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988) (reaffirming longstanding Supreme Court precedents holding that the states, upon entry into the Union, received ownership of their lands and waters); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-78 (1977); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892); *Howard v. Ingersoll*, 54 U.S. 381 (1852); *Pollard v. Hagan*, 44 U.S. 212, 222-23 (1845); *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842). *See also Montana v. United States*, 450 U.S. 544, 551-52 (1981); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 286-87 (1997).

has controlled ownership and allocation of the use of Mississippi's natural resources. *Oregon*, 429 U.S. at 378-82; *Cinque Bambini*, 491 So.2d at 513, 516-19. It is, thus, the State's prerogative to control and preserve state-owned resources. *Id.* at 513, 517.

The ground water at issue has been owned by Mississippi for almost two hundred years, since 1817. For over 160 years, an unbroken line of Supreme Court decisions has consistently traced state ownership of natural resources within the states' boundaries above and below the surface to the American Revolution. Each state's right and responsibility to control the natural resources within its boundaries arises from the American colonies' inheritance of England's common law under which the sovereign or King owned all of the waters, forests, game, minerals and profits upon or under the land. *See Phillips Petroleum*, 484 U.S. at 479; *Oregon*, 429 U.S. at 378; *Illinois Centr.*, 146 U.S. at 452; *Pollard*, 44 U.S. at 222-23; *Waddell's Lessee*, 41 U.S. at 410. When the original thirteen colonies joined in rejecting English royal claims by the Declaration of Independence, each colony asserted the same governmental ownership and control of the waters and other natural resources within their boundaries which was previously exercised by the sovereign. As new states entered the Union, each entered on "equal footing" with those of the original thirteen colonies; that is, each new state was presumed to be endowed with the same sovereign rights and privileges, including sovereignty over all natural resources within the particular territory, as retained by the original thirteen. *Pollard*, 44 U.S. at 222-23.

Within the context of natural resources, this Court has consistently recognized that every state, including

Mississippi, owns the surface water and ground water resources within the geographical confines of its boundaries as a function of statehood. The water resources of each state properly belong to each such state by their inherent sovereignty. *Kansas v. Colorado*, 206 U.S. 46, 93-94 (1907).

*Hinderlider v. LaPlata Co.* (1938) and other equitable apportionment cases relied on by the Fifth Circuit all involved disputes between states over surface water flowing through both states in a river, its tributaries or water sheds. Neither the parties to those cases, nor the Court questioned the individual states' sovereignty over the water while it resided within the state's borders; however, because the water naturally flowed through the boundaries of more than one state, each of those states claimed complete sovereignty over the moving water while it passed through its borders. The remedy of equitable apportionment was necessary in *Kansas v. Colorado*, 206 U.S. 46, 92 - 100 (1907) because both states asserted legitimate sovereign rights in the water of the Arkansas River. As the Court observed: "[b]efore either Kansas or Colorado was settled the Arkansas River was a stream running through the territory which now composes these two States." *Id.* at 99. Exercising this sovereignty, each state had the authority to adopt and enforce different rules of law relating to the taking and use of the water while it remained within the state's borders; but the unconstrained exercise of complete sovereignty by one state with a legitimate claim to the flowing waters violated the cardinal rule of equality of right between those states. *Id.* at 97 - 98. These issues simply do not exist in Mississippi's case against Memphis and MLGW. Before either Mississippi or Tennessee was settled, the water to which Mississippi

claims ownership already resided in Mississippi, not Tennessee, and the ground water at issue falls solely under Mississippi's sovereignty. As a limited natural resource, the ground water in the aquifer was apportioned and each state's rights were established when the state lines of Tennessee and Mississippi were established.

### B. Equitable Apportionment Is Neither a Required Nor an Appropriate Remedy in Mississippi's Civil Action

Mississippi has sued a municipality and its wholly owned utility for the wrongful taking of a natural resource belonging to Mississippi and its citizens. This is not the subject of the Court's equitable apportionment cases which acknowledge each separate state's sovereignty within its geographic boundaries as a natural resource belonging to the state; rather, these cases address a specific problem: while each state is free -- subject to Congress' power to regulate interstate commerce -- to exercise its sovereignty to regulate and control the water within its state, it may not impose its policies on another state through which such water also naturally flows. *Kansas v. Colorado*, 206 U.S. at 95. Nor may Congress impose laws resolving such a dispute between the sovereign states. *Id.* at 97. Accordingly, the Court must resolve disputes between the states arising from their exercise of their sovereign rights.

The District Court and the Fifth Circuit improperly dismissed Mississippi's case for failure to join Tennessee because Mississippi and Tennessee are not asserting conflicting rights. Both states assert sovereignty over the ground water within their state;

Mississippi did not sue Tennessee or challenge its sovereignty over ground water within Tennessee; and Tennessee never moved to intervene in Mississippi's suit against Memphis and MLGW, or objected to the jurisdiction of the District Court. When it filed its *amicus* brief in the Fifth Circuit, Tennessee acknowledged a state's sovereignty over the ground water within its borders and merely stated the position that, if an equitable apportionment action is instituted in the United States Supreme Court by Mississippi, Tennessee would be a party. Neither state contends that Mississippi's suit creates a controversy between Mississippi and Tennessee, and no claim for equitable apportionment has been raised, making the District Court's dismissal error.

Beyond the lack of any legal basis supporting Memphis and MLGW's desire to have part of Mississippi's ground water apportioned to Memphis, equitable apportionment is not an appropriate remedy for the wrong asserted by Mississippi. Equitable apportionment does not compensate for past legal wrongs; rather, it is solely designed to ensure a state its future share of a shared natural resource. *Idaho, ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025-26 (1983). Mississippi seeks damages for retroactive periods dating back forty years. Its damages will continue and increase as long as the present pumping by Memphis is maintained, expanding the cone of depression progressively further into Mississippi. Respondents cannot return or replace the converted water; it is forever lost to Mississippi, and it is impossible for any of the ground water in the aquifer to return or be replenished as long as MLGW continues pumping and expanding the cone of depression further into Mississippi. Without relief, the loss of Mississippi's

natural resources will never be compensated and will only increase.

In order to stop Memphis' taking of Mississippi's water, Memphis will have to shut down a majority of its wellfields and move them north and east out of its service area to contract the cone, or fund, construct and operate a river water treatment plant and distribution system extracting its water supply from the Mississippi River to substitute for the water being taken from Mississippi.[4]

## II. THE OPINION OF THE FIFTH CIRCUIT CONFLICTS WITH MISSISSIPPI'S DECISIONAL AND STATUTORY LAW APPLICABLE TO THE PRESERVATION AND MANAGEMENT OF ITS NATURAL RESOURCES

The Court has repeatedly recognized the authority of the states to adopt both common law and statutory regimes for the preservation, regulation and management of the natural resources within their boundaries, including both surface and ground water. In affirming the District Court's dismissal of Mississippi's action the Fifth Circuit failed to recognize and apply the Mississippi law governing ownership and use of the State's ground water.

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[4] The federal courts have authority to require utilities, like MLGW, to expend funds and construct and operate new facilities when necessary to recompense damages caused to another state. *See Wisconsin v. Illinois & Sanitary Dist. of Chicago*, 278 U.S. 367, 420-21 (1929) (Court, in original action, required non-state party sanitation district to provide sufficient funding and to construct and operate "with all reasonable expedition" adequate plants for sewage disposition rather than by lake diversions).

### A. *Cinque Bambini* and Mississippi's "Omnibus Water Rights Act"

In *Cinque Bambini*, the Mississippi Supreme Court announced that the public trust doctrine applies to all the State's natural resources, including subterranean resources such as ground water. *Cinque Bambini* largely reaffirmed Mississippi's decisional law and policy establishing state ownership and control of the water resources within its borders for the beneficial use of the people of the State.[5] About the same time, Mississippi enacted its "Omnibus Water Rights Act" which declared and confirmed the State's ownership of all water sources within the State's borders.[6] These basic principles are codified in Mississippi's statutory

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[5] *See State Game & Fish Comm'n v. Louis Fritz Co.*, 187 Miss. 539, 193 So. 9 (1940) (State is the owner of water within its borders and incident to this ownership has a right and duty to police and protect it; court stresses police power connected with State's ownership in trust for the people); *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44 (1938) (State has power, as trustee, to bring a trespass action to recover value of subterranean resources removed from river bed).

[6] MISS. CODE ANN. §§51-3-1, *et seq.* (1985 & Supp. 2008) (Mississippi's 1985 Omnibus Water Rights Act codifies state ownership of ground water under the public trust). *See also* Mississippi's 1976 Ground Water Capacity Use Act, MISS. CODE ANN. §51-4-1 (1976) (declaring ground water to be among the State's basic resources subject to state control and development for the benefit of the people); Richard J. McLaughlin, "Mississippi" in 6 *Water and Water Rights*, 712 (Robert E. Beck, Ed., 1991, repl. vol. 2005) ("[b]oth surface water and ground water are regarded as property of the State of Mississippi.").

regulated riparian regime[7] which provides, in pertinent part:

> ***All water, whether occurring on the surface of the ground or underneath the surface of the ground, is hereby declared to be among the basic resources of this state and therefore belong to the people of this state***, and is subject to regulation in accordance with the provisions of this chapter. ***The control and development and use of water for all beneficial purposes shall be in the state, which, in the exercise of its police powers, shall take such measures to effectively and efficiently manage, protect and utilize the water resources of Mississippi.***

MISS. CODE ANN. §51-3-1 (1985 & Supp. 2008) (emphasis, in bold italics, added). This statute reaffirms that, as the legal owner of its water resources, Mississippi has the power, authority, and fiduciary obligation, to take all steps necessary to protect ground water for its citizens' use.

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[7] Mississippi's adoption of regulated riparianism is part of a trend in a majority of eastern states to abandon antiquated 19th century riparian common law doctrines and replace those old legal systems with modern legislative regimes premised upon state ownership and management of water resources. *See generally* App., 57a - 60a. Such principles have long dominated water law and rights in all the western states. *See id.*, 60a-62a. *See also* American Society of Civil Engineers, "Regulated Riparian Model Water Code," Section 1-R-1-01 at 1 (2004) ("the waters of the State are a natural resource owned by the State in trust for the public and subject to the State's sovereign power to plan, regulate and control the withdrawal and use of those waters").

The state boundaries superimpose a geopolitical grid over the territories occupied by the states overlying the geological formation making up the aquifer. In order to give full credence to the sovereignty retained in each state over its land and natural resources, the Court has recognized the state borders in determining the rights of the state and its citizens over the competing claims of citizens of abutting states.[8] The ground water underlying Mississippi belongs to Mississippi, the ground water underlying Tennessee belongs to Tennessee, and so on. The Fifth Circuit decision errs in equating the aquifer ground water to interstate surface waters. These distinctly different water resources have profoundly different behavior characteristics which determine the residence and ownership of the resource. The Fifth Circuit's decision overlooks the residence time of water within a particular geographic area. Surface water

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[8] *See Howard v. Ingersoll*, 54 U.S. 381 (1852). Ingersoll brought an action in the circuit court of Alabama (state court) to recover damages for wrongful obstruction by Howard of the Chattahoochee River which caused the waters of the river to flood Ingersoll's land and obstruct the use of his mill. While the underlying dispute involved private (non-state) claimants, the determinative issue, according to the Court, was one of boundary between the States of Georgia and Alabama. The Court held that the western line of Georgia was established upon the western bank of the Chattahoochee River and that, therefore, the river "resided" within Georgia's territorial boundaries. The Court sent the case back to state court, quoting from an earlier opinion by Chief Justice Marshall: "[W]hen a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention about it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants territory on the one side only, it retains the river within its domain, and the newly created State extends to the river only." 54 U.S. at 412.

has a very brief residency -- perhaps only hours or days -- as it flows freely across state lines. Even then, each state owns and controls the water resources while they exist or reside within that state's borders. In contrast, ground water has residency times that span millennia. The Mississippi ground water in the aquifer resided there for thousands of years and would have continued to reside in Mississippi for its citizens in the future but for MLGW's aggressive mechanical extractions from under Mississippi territory. Mississippi's ground water resource is not and has never been a shared resource under natural conditions.

B. The Fifth Circuit's Decision Effectively Abrogates the Public Trust Doctrine and Conflicts with the Laws of All States Regarding State Ownership and Control of Water Resources.

All states trace their sovereign ownership and rights to manage and preserve their water resources to the public trust. Mississippi's sovereign authority and responsibility over its natural resources as recognized in *Cinque Bambini*, *Louis Fritz* and *Stewart* comports with federal and state authorities from a majority of states. Mississippi's Omnibus Water Rights Act codifying the public trust and the State's sovereign role as trustee is also consistent with legislative enactments and constitutional provisions of other states. A compilation of numerous decisions, statutes and constitutional provisions from thirty-five states may be referenced at App., 54a-62a. These state laws are firmly rooted in this Court's cases overlooked by the Court of Appeals. *See* note 3 & accompanying text *supra*.

Under the United States Constitution as read by the Court, the ground water in the aquifer which is the subject of Mississippi's federal court action became the property and responsibility of Mississippi at the time it was admitted to the Union as one of these United States; accordingly, there is nothing to apportion. Taken to its logical conclusion, the Fifth Circuit's decision appears to suggest that this Court's decisions assert an Article III right and obligation of the Court to "equitably reallocate" one state's natural resources to a municipality across the state line in another state. This is certainly the essence of Memphis' argument with which it obtained the dismissal of the District Court case; however, there is no Constitutional basis for any such claim.

## III. THE FIFTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE DECISIONS OF THE COURT AND THEIR APPLICATION BY THE ELEVENTH AND EIGHTH CIRCUITS LIMITING THE COURT'S EXERCISE OF ITS ORIGINAL AND EXCLUSIVE JURISDICTION UNDER U.S. CONST. ART. III, SECTION 2 AND 28 U.S.C. §1251(a).

Mississippi claims that Memphis and MLGW have mechanically extracted and converted ground water naturally residing within Mississippi's territorial boundaries through the medium of the aquifer, an interstate geological formation. Under *Illinois v. Milwaukee*, 406 U.S. 91 (1972), these claims involving a transboundary dispute between a state and a municipality and public utility in another state, both non-state entities, conferred federal question

jurisdiction[9] on the District Court. Because the action does not involve two states, it is not within the original and exclusive jurisdiction of the United States Supreme Court and the proper, available forum is the District Court. *Illinois v. Milwaukee*, *supra* at 97, 103-08; *Alabama v. United States Army Corps of Engineers*, 424 F.3d 1117, 1130 (11th Cir. 2005) ("*Alabama II*"); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025-26 (8th Cir. 2003), *cert. den.*, 541 U.S. 987 (2004); *Georgia v. United States Army Corps of Engineers*, 302 F.3d 1242, 1254-55 (11th Cir. 2002); *Alabama v. United States Army Corps of Engineers*, 382 F.Supp.2d 1301, 1309-12 (N.D. Ala. 2005) ("*Alabama I*").

The Fifth Circuit's position -- that a dispute over ground water residing in a deep confined aquifer is automatically "between two states" -- ignores the

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[9] The interstate nature of the sand formation comprising the aquifer conferred federal question jurisdiction on the District Court. *Illinois*, *supra*, at 104-07; *Hinderlider v. LaPlata Co.*, 304 U.S. 92, 110 (1938); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). Mississippi's claims are governed by federal common law because of the transboundary character of the aquifer. Federal courts have long recognized the need to create and apply federal common law in a variety of claims including trespass, conversion, unjust enrichment and injunctive relief as sought by Mississippi. Thus, it is the interstate context that actually gives rise to the District Court's subject matter jurisdiction in a manner consistent with the decisions of the Court and the Eighth and Eleventh Circuits relied on herein. State law will be adopted as the federal rule in fashioning federal common law remedies for Mississippi's claims. *Compare Illinois*, *supra*, at 107 (state's standards relevant and considered in dispute resolution) *with Central Pines Land Co. v. United States*, 274 F.3d 881, 890 nn. 32 & 34, 892-93 & n. 49 (5th Cir. 2001) (state law borrowed as the federal rule of decision).

undisputed geology and hydrogeology. This broad formulation also ignores the distinction between sovereign governments and their citizens which have been recognized by this Court and the Eleventh and Eighth Circuits in cases involving water quality and allocation disputes. *Illinois*, *supra* at 97-98, 108 (Supreme Court declined to exercise §1251(a) jurisdiction holding that Wisconsin was not a mandatory party in Illinois' suit against Milwaukee over pollution of Lake Michigan); *Alabama II*, *supra*, at 1130 (Eleventh Circuit held that Alabama's water supply allocation suit against Corps of Engineers involving Lake Lanier with Georgia and Florida on opposite sides of case did not deprive district court of jurisdiction under §1251(a)); *Ubbelohde*, *supra*, at 1025-26 (Eighth Circuit held water quantity controversy between South Dakota and Corps involving releases from Missouri River where Nebraska sought intervention did not trigger §1251(a) to strip district court of jurisdiction despite states' adverse interests); *Georgia*, *supra*, at 1254-55 (Eleventh Circuit held intervention of Florida and utility in Georgia's water quantity action against Corps did not invoke §1251(a) jurisdiction of Supreme Court); *Alabama I*, *supra*, at 1309-10 (Georgia's "argument that 'interstate water disputes' automatically fall within the Supreme Court's original exclusive jurisdiction because the general subject implicates states' competing interests in water is misplaced"). The Fifth Circuit's decision conflicts with governing decisions from this Court and the Eighth and Eleventh Circuit Courts of Appeals.

There are two basic flaws in the Fifth Circuit's rejection of Mississippi's authorities on this issue. First, this is <u>not</u> a state versus state controversy;

rather, Mississippi sued Memphis, a political subdivision of Tennessee, and its utility division, MLGW, both of which are non-state entities. The Eighth and Eleventh Circuits' cases involved state actions against the Corps of Engineers, a non-state entity; however, neither the presence, nor potential intervention or participation, of state parties divested the district courts of jurisdiction in *Alabama II* (Eleventh Circuit), *Ubbelohde* (Eighth Circuit), or in this Court's seminal ruling in *Illinois v. Milwaukee*. The instant action presents an even clearer example of a state versus non-state entities. Second, there is an available forum in which this matter is already prepared for trial and complete adjudication of the issues may be obtained -- the U.S. District Court for the Northern District of Mississippi.

These two essential factors, rigorously applied in evaluating the Court's exercise of jurisdiction under Section 1251(a), were not given proper attention by the Fifth Circuit. In *Wyoming v. Oklahoma*, 502 U.S. 437 (1991), this Court held that to constitute a proper controversy under 28 U.S.C. §1251(a), it must appear that the complaining state has suffered wrong through the action of the other state, furnishing ground for judicial redress, or is asserting a right against the other state which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence. *Wyoming v. Oklahoma*, 502 U.S. at 447, *citing Maryland v. Louisiana*, 451 U.S. 725, 735-36 (1981) (*quoting Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939)); *see also New York v. Louisiana*, 274 U.S. 488, 490 (1927).

For this action to be characterized as a dispute "between states," Mississippi must seek relief against Tennessee for wrongs caused by Tennessee's actions. *See Mississippi v. Louisiana*, 506 U.S. 73, 78 n. 2 (1992) ("Louisiana's intervention is also unaffected by §1251(a) because it does not seek relief against Mississippi."); *United States v. Nevada*, 412 U.S. 534, 537 (1973) (where two states with opposing interests in federal water allocation suit did not seek relief from one another, case fell outside §1251(a) jurisdiction).

Mississippi seeks damages against Memphis and MLGW only and has made no claim against Tennessee. Nor does Tennessee have any adverse claim against Mississippi. Other circuits in water quantity and quality cases have held that "[a] controversy between two or more states exists only when, unlike this case at this time, the states are actually seeking relief from one another." *Alabama I*, *supra*, at 1311. *See also Alabama II*, *supra*, at 1130 (to invoke Supreme Court's §1251(a) jurisdiction, plaintiff state must first demonstrate that injury for which redress is sought was directly caused by actions of another state, *quoting Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976)); *Ubbelohde*, *supra*, at 1025-26 (same); *Georgia*, *supra*, at 1256 n. 11 (same).

The Fifth Circuit's conflict with decisions of this Court and other federal circuits stems from its assumption that ground water residing in any, however slightly permeable, interstate geological formation must, by definition, be a shared resource of all states overlying that formation. This leap from the apportionment of free flowing interstate surface water jointly claimed by two sovereign states, to a city's mechanical extraction of prehistoric water residing in

another state and to which its own state makes no claim, finds no support in the law. Tennessee's rights and interests are not implicated solely because the ground water being siphoned from Mississippi by Memphis must travel through a transboundary geological formation. Because Mississippi owns the ground water naturally residing in the State as sovereign and Mississippi's claims do not cover any ground water which would ever naturally reside in Tennessee, this action does not concern competing claims of states against one another. *See Alabama II*, *supra*, at 1130 (suit must involve controversy between states based on damages to one state directly caused by the other state); *see also Georgia*, *supra*, at 1248, 1254-55 (Florida argued that Georgia was seeking to effect *de facto* apportionment in water quantity allocation dispute over interstate water basins; district court allowed intervention, but retained subject matter jurisdiction as Florida may not be able to protect its interests in Supreme Court equitable apportionment action).

*Illinois v. Milwaukee* squarely addresses and controls the question presented. *Illinois* was an action by a state (Illinois) against a municipality (Milwaukee) and certain sewerage commissions involving water pollution. This Court declined to exercise its §1251(a) jurisdiction and remitted the parties to the district court which had jurisdiction over the parties and could provide complete relief without joinder of other affected states. 406 U.S. at 107. The recent decisions in *Alabama I & II*, *Georgia* and *Ubbelohde*, *supra*, follow the logic of *Illinois*. *See also Connecticut v. Cahill*, 217 F.3d 93, 95, 104-05 (2nd Cir. 2000) (New York's sovereignty not implicated as no relief sought that would require state to disburse funds from its

treasury to Connecticut; §1251(a) jurisdiction not invoked as suit not "between two or more States"); *accord*, *California v. Nevada*, 447 U.S. 125, 133 (1980) (because matter did not involve dispute between California and Nevada, it did not fall in Supreme Court's original jurisdiction); *North Dakota v. Minnesota*, 263 U.S. 365, 371-72, 378 (1923) (bill dismissed as Minnesota not responsible for flooding in North Dakota).

These cases recognize that 28 U.S.C. §1251 circumscribes the Supreme Court's original jurisdiction based on the identity of the parties to a dispute, not based on the subject of the dispute between the parties. In *Alabama I*, *supra*, the court observed that even when states are in conflict, the Supreme Court's original jurisdiction is not necessarily implicated:

> Just because states pursue opposing interests in a case does not necessarily mean a "controversy" exists between or among them, or that the Supreme Court will exercise original jurisdiction.

*Id.* at 1310. In deciding whether to accept an action -- even one clearly within its original jurisdiction -- the Supreme Court considers two factors: "the nature of the interest of the complaining state" and "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

The Court exercises its original jurisdiction only very sparingly. *See id.*; *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992); *Maryland v. Louisiana*, 451 U.S.

725, 739 (1981); *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971). It will only exercise jurisdiction in "serious" cases such as would amount to *casus belli* if the states were fully sovereign. *Mississippi*, 506 U.S. at 77; *Texas v. New Mexico*, 462 U.S. 554, 571 n. 18 (1983); *Alabama I*, *supra*, at 1311. *See also Illinois*, *supra*, at 93-94 (§1251(a) jurisdiction obligatory only in cases of seriousness); *Louisiana v. Texas*, 176 U.S. 1, 15 (1900) (original jurisdiction exercised only when necessity is absolute). The exclusive jurisdiction of the Supreme Court is limited to cases in which the states are and remain opponents in the controversy, regardless of their formal alignment. *Alabama I*, *supra*, at 1310, *citing United States v. Nevada*, 412 U.S. 534, 538-40 (1973); *California v. Nevada*, 447 U.S. 125, 133 (1980). Simply stated, it is essential that the complaining state has suffered a wrong through the action of the other state. *Alabama II*, *supra*, at 1130; *Georgia*, *supra*, at 1256 n. 11 (*quoting Massachusetts v. Missouri*, 308 U.S. 1 (1939)); *Alabama I*, *supra*, at 1311, *citing Mississippi*, 506 U.S. at 78 n. 2; *United States v. Nevada*, 412 U.S. 534, 537 (1973) (*per curiam*) and relying on *Ubbelohde*, 330 F.3d at 1025-26, and *Georgia*, 302 F.3d at 1256 n. 11. As Mississippi and Tennessee have neither asserted a wrong nor sought any relief against one another for injury directly caused by either state, the first factor governing exercise of Supreme Court original jurisdiction cannot be demonstrated.

The second factor -- availability of an alternative forum -- mandates reversal of the Fifth Circuit. Mississippi's common law tort action for damages against the sole tortfeasors, Memphis and MLGW, may be heard in the District Court which has

jurisdiction over the parties and authority to grant complete relief to those parties already present in the case. *See Mississippi*, 506 U.S. at 77; *Texas*, 462 U.S. at 571 n. 18; *Arizona*, 425 U.S. at 797; *Illinois*, 406 U.S. at 93; *Georgia*, 302 F.3d at 1254-55; *Alabama I* at 1311. Accordingly, this Court's original, exclusive jurisdiction under §1251(a) is not invoked by Mississippi's claims and the Fifth Circuit should be reversed to resolve the conflict between the Circuits and with this Court's decisions.

## IV. THIS CASE PRESENTS QUESTIONS OF NATIONAL IMPORTANCE REGARDING THE SOVEREIGN RIGHTS OF MISSISSIPPI AND ALL OTHER STATES TO OWNERSHIP AND CONTROL OF STATE WATER RESOURCES.

The Court should grant certiorari because the core issues implicate the sovereign rights and powers of all states and impact significant property rights and pecuniary interests.

Mississippi's claims are based on its ownership of all water resources within its territorial boundaries. Mississippi, like every state in the United States, entered the Union on "equal footing" with the original thirteen colonies and was presumed to be endowed with the same self-evident, inalienable rights and privileges, including sovereignty with respect to all waters and other natural resources within their borders. *See Phillips Petroleum*, 484 U.S. at 479; *Oregon*, 429 U.S. at 378; *Illinois Centr.*, 146 U.S. at 452; *Pollard*, 44 U.S. at 222-23; *Waddell's Lessee*, 41 U.S. at 410. All states, including Mississippi, have declared sovereignty and plenary authority over water resources within their boundaries, including

subterranean ground water. *Cinque Bambini*, 491 So.2d 508, 511-14, 516-17 & 519-20 (affirmed by this Court in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988)), MISS. CODE ANN. §51-3-1 (1985 & Supp. 2008). The Fifth Circuit's decision -- which effectively declares that Mississippi does not own the State's ground water resources -- would, if affirmed, have the pernicious effect of abrogating the public trust doctrine and undermining the constitutional, statutory and decisional laws of most, if not all, states of the Union which rest on the rights and powers retained by the states under the United States Constitution. *See* App., 54a - 62a.

The water rights laws and water management policies of Mississippi and the remaining forty-nine states are grounded historically in the public trust doctrine arising from the retained sovereignty of the states. The Fifth Circuit's decision is in conflict with these fundamental precepts applying to all states. The Court has granted certiorari to review decisions of circuit courts of appeals in matters where the interests of other states may be affected. *See New York v. Ferber*, 458 U.S. 747, 749 n. 2 (1982) (Court noted that statute in question had identical or similar counterparts in statutes in forty-seven other states); *Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961) (Court granted certiorari (364 U.S. 811) because of importance of the ruling to the new state of Alaska); *New York v. O'Neill*, 359 U.S. 1, 3 (1958) (Court granted certiorari (356 U.S. 972) inasmuch as holding brought into question the constitutionality of statute enforced in forty-two states and the Commonwealth of Puerto Rico); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221 (1957) (Court granted certiorari to Texas Court of Appeals (352 U.S. 925) because case raised

important question, not only to California, but to other states which have similar laws); *New York v. United States*, 326 U.S. 572, 547 (1946) (Court granted certiorari to Second Circuit (322 U.S. 724) in matter involving state's sales of waters or other disposition of natural resources under laws similar to other states). On these authorities, this Court should grant Mississippi's petition.

Mississippi's claims also involve significant property rights governed by State law. *Oregon*, 429 U.S. at 378-82; *Cinque Bambini*, 491 So.2d at 513, 516-19. The ground water which has underlain Mississippi for thousands of years, now being wrongfully extracted from Mississippi by Memphis and MLGW through mechanical means, represents a valuable property residing in the State under the Constitution. In its action, Mississippi seeks recovery of more than one billion dollars in compensatory damages and prejudgment interest.[10]

This Court has often granted certiorari in matters involving important questions of liability for substantial monetary damages or where significant property interests were in dispute. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 211 n. 7 (1982) (Court granted certiorari because of an important question of government's liability for monetary damages for breach of trust in connection with management of

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[10] Details regarding the bases for and derivation of Mississippi's damages may be reviewed in the excerpts from expert economic reports prepared by Dr. William G. Foster and Dr. William W. Wade annexed as Exhibits 3 & 4 to "Appendix G" at 118a-188a to Mississippi's Motion for Leave to File Bill of Complaint in Original Action filed contemporaneously with this petition.

forest resources allotted lands of Quinault Indian Reservation); *Andrus v. Utah*, 446 U.S. 500, 506 (1980) (Court granted certiorari to Tenth Circuit (442 U.S. 982) because dispute involved disposition of vast amounts of public lands amounting to over 500,000 acres in state claim to right to select valuable oil shale lands in lieu of lost school lands); *Commissioner of Internal Revenue v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 nn. 4 & 5 (1977) (Court granted certiorari to Tenth Circuit (429 U.S. 814) because decision conflicted with Fourth, Fifth, Sixth and Seventh Circuits and involved an important liability question with more than one hundred million dollars in dispute); *Territory of Alaska v. American Can Co.*, 358 U.S. 224, 224-25 (1959) (Court granted certiorari in view of fiscal importance of question to State of Alaska); *United States v. Zazove*, 334 U.S. 602, 613-14 n. 17 (1948) (certiorari granted to Seventh Circuit in matter involving potential liability amounting to billions of dollars).

The Fifth Circuit's judgment in Mississippi's action implicates all of these important issues and provides the Court with an opportunity to address them in an area of national importance to every state in the Union: the states' rights in ground water resources.

## CONCLUSION

In accordance with the foregoing, Mississippi respectfully requests the Court to grant its Petition for Writ of Certiorari and for such other and further relief to which Mississippi may, in equity and good conscience, be entitled.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**No. 08-60152**

**[Filed June 5, 2009]**

JIM HOOD, Attorney General, ex rel; STATE OF MISSISSIPPI, Acting for Itself and Parens Patriae for and on behalf of the People of the State of Mississippi

Plaintiffs-Appellants

v.

THE CITY OF MEMPHIS, TENNESSEE; MEMPHIS LIGHT GAS & WATER DIVISION

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Mississippi

Before HIGGINBOTHAM, BENAVIDES, and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

In this lawsuit, the state of Mississippi seeks damages from the City of Memphis and Memphis Light, Gas and Water ("MLGW") (collectively, "Memphis"), for the alleged conversion of groundwater in the Memphis Sands Aquifer (the "Aquifer"). The district court dismissed Mississippi's lawsuit without prejudice, holding that Tennessee is an indispensable party to the suit and that the court was without power to join Tennessee. We AFFIRM.

## I. BACKGROUND

The Aquifer is located beneath portions of Tennessee, Mississippi, and Arkansas. There is no interstate compact governing use of the Aquifer's water, and thus no specific volumes of groundwater from the Aquifer have been apportioned to Mississippi, Tennessee, or Arkansas. The Aquifer is the primary water source for both DeSoto County, Mississippi, and the city of Memphis, Tennessee, which lies just across the state line from DeSoto County. Mississippi seeks past and future damages, as well as equitable relief, related to Memphis's allegedly wrongful appropriation of groundwater from the Aquifer.[1] Mississippi alleges that part of the groundwater that Memphis pumps from the Aquifer is Mississippi's sovereign property and that the state must therefore be compensated.

MLGW, a division of the City of Memphis, owns and operates one of the largest artesian water systems

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[1] Although there was some dispute between the parties below as to the basis of jurisdiction, federal question jurisdiction is present both because 28 U.S.C. § 1331(a) includes suits brought by a state and because federal common law will apply to the dispute. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99 (1972).

in the world. It is responsible for providing gas, electricity, and water to its residential, business, governmental, and other customers, who are primarily citizens of Memphis. Although three of its groundwater well fields are located near the Tennessee border, all of MLGW's wells are located within Tennessee, and Memphis and Tennessee contend that this municipal water program operates under the direction and control of Tennessee law.[2]

Mississippi asserts that MLGW's groundwater pumping has created an underground "cone of depression" centered under Memphis and extending into Mississippi. Mississippi states that this cone of depression causes groundwater that would otherwise lie beneath Mississippi to flow across the border and into the cone under Tennessee, and thus become available to be pumped by Memphis. Mississippi argues that due to the growth of Memphis's water system the Aquifer is being drawn down at a higher rate than it is being replenished, thus causing water levels to drop.

Mississippi filed its first complaint against Memphis in February 2005. Memphis filed a motion to dismiss on several bases, including that the state of Tennessee was an indispensable party pursuant to

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[2] *See, e.g.*, TENN. CODE ANN. § 68-221-707 (Tennessee Department of Environment and Conservation exercises supervision over operation of public water systems, including features of operation that affect quantity of water supplied). Mississippi contends that Memphis's groundwater pumping is not controlled by Tennessee law, but cites no legal authority for that conclusion, and neither does it address the provisions of Tennessee law cited in Memphis's brief.

Federal Rule of Civil Procedure 19. The motion to dismiss was denied in August 2005. Memphis then moved to "amend" the district court's order or to certify an interlocutory appeal. Construing the motion to amend as a motion for rehearing, the district court denied both motions in September 2005. Memphis filed an answer and subsequent amended answer. Mississippi filed an amended complaint in October 2006, eliminating certain claims and clarifying its request for an award of monetary damages for Memphis's alleged misappropriation of Mississippi's groundwater.

In June 2007, Memphis moved for judgment on the pleadings, again arguing that Tennessee was an indispensable party to the suit. Memphis also moved for partial summary judgment on several of Mississippi's claims. In September 2007, the court denied the motions.

In late January 2008, shortly before the bench trial was to start, the district court announced that it had decided *sua sponte* to revisit the issue of Tennessee's possible status as an indispensable party and thus the court's subject-matter jurisdiction. After briefing from the parties and oral argument, the district court dismissed the suit for failure to include Tennessee, an indispensable party.[3] Mississippi appeals.

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[3] In its opinion dismissing this suit, the district court directed that the Arkansas Attorney General should be put on notice of the pendency of this action and any future action filed in the U.S. Supreme Court, although the court refrained from determining whether Arkansas is also an indispensable party.

## II. DISCUSSION

### *A. Standard of Review*

We review the district court's decision to dismiss for failure to join an indispensable party for an abuse of discretion. *HS Res., Inc. v. Wingate*, 327 F.3d 432, 438-39 (5th Cir. 2003). Determining whether an entity is an indispensable party is a highly-practical, fact-based endeavor, and "[Federal Rule of Civil Procedure] 19's emphasis on a careful examination of the facts means that a district court will ordinarily be in a better position to make a Rule 19 decision than a circuit court would be." *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 2006). However, "[a] court abuses its discretion when its ruling is based on an erroneous view of the law." *Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir. 1995).

Determining whether to dismiss a case for failure to join an indispensable party requires a two-step inquiry. First the district court must determine whether the party should be added under the requirements of Rule 19(a). Rule 19(a)(1) requires that a person subject to process and whose joinder will not deprive the court of subject-matter jurisdiction be joined if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a

> substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a)(1). While the party advocating joinder has the initial burden of demonstrating that a missing party is necessary, after "an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder." *Pulitzer-Polster*, 784 F.2d at 1309.

If the necessary party cannot be joined without destroying subject-matter jurisdiction, the court must then determine whether that person is "indispensable," that is, whether litigation can be properly pursued without the absent party. *HS Res.*, 327 F.3d at 439. The factors that the district court is to consider in making this determination are laid out in Rule 19(b):

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by; (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

FED. R. CIV. P. 19(b).

Mississippi contends that the district court misapplied Rule 19 in holding that Tennessee is a necessary and indispensable party because its suit does not implicate any sovereign interest of Tennessee. Mississippi argues that its suit does not require an equitable apportionment of the Aquifer because the state owns the groundwater resources of the state as a self-evident attribute of statehood, and thus there is no interstate water to be equitably apportioned. Mississippi further argues that it is not seeking relief for damages caused by the direct actions of Tennessee, and therefore the suit is not an action between states invoking the original jurisdiction of the Supreme Court.

Memphis responds that the district court correctly determined that the nature of Mississippi's claims and asserted ownership of a water resource that it shares with Tennessee makes Tennessee an indispensable party to suit. Memphis argues that because Tennessee's sovereign ownership rights in the Aquifer water, the same which Mississippi seeks to protect, are implicated, the case cannot be properly resolved without Tennessee's participation. Memphis points to a century of Supreme Court case law addressing the equitable apportionment of interstate waters among states to argue that the district court correctly held that joining Tennessee would create a suit between states that must be filed in the Supreme Court.[4]

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[4] Tennessee, participating in this appeal as *amicus curiae*, asserts that it has a sovereign interest in its share of Aquifer water as great as that asserted by Mississippi, and it therefore is a necessary and indispensable party to any suit over Memphis's withdrawals from the Aquifer.

### *B. Tennessee is a Necessary Party to this Water Ownership Dispute*

The district court held that Tennessee was a necessary party under Rule 19(a)(1) because in its absence complete relief could not be accorded between Memphis and Mississippi. The court explained that it could not determine whether Memphis had misappropriated water from the Aquifer without determining *what portion* of the Aquifer belongs to Mississippi and Tennessee respectively, and thus an equitable apportionment of the Aquifer between the states was required. In so holding, the district court rejected Mississippi's argument, renewed on appeal, that only Mississippi's water is at issue. Mississippi's fundamental argument as to why Tennessee's presence in the lawsuit is unnecessary is that the Aquifer's water is not an interstate resource subject to equitable apportionment, and therefore Tennessee's sovereign interests are not implicated by the suit.

We find that the district court made no error of law as to the necessity of equitably apportioning the Aquifer. The Aquifer is an interstate water source, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share. *See Hinterlander v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05 (1938). Allocation of an interstate water source is accomplished through a compact approved by Congress or an equitable apportionment. *Id.*

"Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an

interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). The Supreme Court has described the applicability of this doctrine in broad terms:

> [W]henever . . . the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

*Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907). Determining Mississippi and Tennessee's relative rights to the Aquifer brings this case squarely within the original development and application of the equitable apportionment doctrine. The fact that this particular water source is located underground, as opposed to resting above ground as a lake, is of no analytical significance. The Aquifer flows, if slowly, under several states, and it is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water. *See, e.g., Nebraska v. Wyoming*, 515 U.S. 1 (1995) (allocation of North Platte River); *Wisconsin v. Illinois*, 449 U.S. 48, 50 (1980) (amending order allocating usage of portions of Lake Michigan).[5]

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[5] A handful of Supreme Court cases mention aquifers in the context of interstate water disputes. *See Texas v. New Mexico*, 462 U.S. 554, 556-57, n.1, 2 (1983) (discussing role of New Mexico aquifers feeding the Pecos River, subject of litigation, and possible detrimental effects of pumping); *Wisconsin*, 449 U.S. at 50 (court order amending prior decree with requirements including "to the

Mississippi argues that it owns a fixed portion of the Aquifer because it controls the resources within its state boundaries, citing to Mississippi and federal law demonstrating the state's sovereign rights over the soil, forest, minerals, etc. Despite Mississippi's contentions, it is clear that the Aquifer is not a fixed resource like a mineral seam, but instead migrates across state boundaries. The Supreme Court has consistently rejected the argument advanced by different states, and advanced by Mississippi in this lawsuit, that state boundaries determine the amount of water to which each state is entitled from an interstate water source.[6] *See, e.g.*, *Hinterlander*, 304 U.S. at 102 (Colorado's contention that it "rightfully may divert and use . . . the waters flowing within her boundaries in this interstate stream . . . cannot be maintained. The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other,"

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extent practicable allocations to new users of Lake Michigan water shall be made with the goal of reducing withdrawals from the Cambrian-Ordovician aquifer"). While these opinions do not address aquifer allocation directly, the fact that the aquifers were not treated differently from any other part of the interstate water supply subject to litigation supports the conclusion that the Aquifer at issue must be apportioned.

[6] Notably, the equitable apportionment doctrine has been used to address other migratory interstate resources, including the apportionment of fish that make an interstate migration. *See Idaho v. Oregon*, 462 U.S. 1017, 1024 (1983) ("Although that doctrine has its roots in water rights litigation, the natural resource of [migratory salmon] is sufficiently similar to make equitable apportionment an appropriate mechanism for resolving allocative disputes.").

quoting *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922)).

The Aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests, and whose allotment is subject to interstate compact or equitable allocation. Therefore, we find no error in the district court's conclusion that Tennessee's presence in the lawsuit was necessary to accord complete relief to Mississippi and Memphis. *See Pulitzer-Polster*, 784 F.2d at 1309.

### *C. Tennessee's Joinder Would Destroy Subject-Matter Jurisdiction*

After finding Tennessee to be a necessary party, the district court held that it was without power to join the state because original and exclusive jurisdiction over a suit between Mississippi and Tennessee would reside in the United States Supreme Court. *See* 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."). Mississippi argues that even if Tennessee's presence in the suit is necessary, it does not invoke the Supreme Court's original jurisdiction, and the district court could therefore retain jurisdiction over the case. We disagree.

Mississippi argues that the district court has subject-matter jurisdiction because this suit is only against Memphis, not Tennessee, and would at most be subject to the Supreme Court's original but non-exclusive jurisdiction. *See* 28 U.S.C. § 1251(b)(3) ("The Supreme Court shall have original but not exclusive jurisdiction of . . . All actions or proceedings by a State against the citizens of another State."). The

Supreme Court has in the past stated a preference that such suits be brought in the district court in the first instance. *See United States v. Nevada*, 412 U.S. 534, 538 (1973). Mississippi's argument that its suit is not against Tennessee hangs on the assertion that only Memphis's actions, and not Tennessee's, are at issue. *See Milwaukee*, 406 U.S. at 97 (holding that where Illinois sued Milwaukee for polluting Lake Michigan, not mandatory to sue Wisconsin as well). However, that contention ignores that, in contrast to *Milwaukee*, this suit requires an allocation of water rights between states: Memphis's actions are not wrongful unless there is a defined allocation of water that it is allowed to pump. Tennessee is a necessary party under Rule 19(a) on that basis, and the suit is thus one between two states.

Mississippi correctly argues that a suit involving interstate water does not *automatically* invoke the jurisdiction of the Supreme Court and strip the district court of jurisdiction. However, the cases to which Mississippi analogizes are distinguishable. Four cases upon which Mississippi relies most heavily are suits against the U.S. Army Corps of Engineers ("Corps of Engineers"), not against other states, and therefore plainly not within the scope of 28 U.S.C. § 1251(a). *See Alabama v. U.S. Army Corps of Eng's*, 424 F.3d 1117, 1130 (11th Cir. 2005) ("*Alabama II*") (recognizing that Alabama's suit against the Corps of Engineers was not a dispute between states, despite intervention of other states as parties, because the litigation was over how the Corps of Engineers should fulfill its obligations under federal law); *Georgia v. U.S. Army Corps of Eng's*, 302 F.3d 1242, 1254-55 (11th Cir. 2002) (same); *Alabama v. U.S. Army Corps of Eng's*, 382 F. Supp. 2d 1301, 1309-12 (N.D. Ala. 2005) ("*Alabama I*") (same);

*also South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025-26 (8th Cir. 2003) (same).

Mississippi also relies heavily on *Milwaukee v. Illinois*, the case that the district court identified as the basis for its earlier rulings denying Memphis's arguments that Tennessee is an indispensable party. 406 U.S. 91 (1972). *Milwaukee* is distinguishable. *Milwaukee* involved a federal common law nuisance action to stop alleged pollution of Lake Michigan by the city of Milwaukee's sewage disposal practices. The Supreme Court denied Illinois's motion for leave to file a bill of complaint against Wisconsin, holding that the action did not trigger the Supreme Court's exclusive jurisdiction. The Court found that, under appropriate pleadings, Wisconsin could be joined as a defendant, but that it was not a mandatory defendant on the facts of the case. *Id.* at 97. The Court concluded that the case fell under 28 U.S.C. § 1251(b)(3), giving the Supreme Court original but not exclusive jurisdiction over certain actions, and therefore Illinois could and should file suit in the appropriate federal district court. *Id.* at 108.

Mississippi argues that *Milwaukee* is a more analogous case than the water-allocation cases because Mississippi, like Illinois, merely seeks to enjoin the actions of the city of Memphis and does not have any claim against Tennessee as a state. Mississippi's argument fails, however, because of the crucial factual difference between the two cases: *Milwaukee* involved stopping the pollution of what was agreed to be an interstate water body, while Mississippi claims sole ownership of a portion of the interstate water at issue. Mississippi's suit necessarily asserts control over a portion of the interstate resource Memphis currently

utilizes pursuant to Tennessee law. *See, e.g.*, TENN. CODE ANN. § 68-221-707(a)-(b) ("The [Tennessee Department of Environment and Conservation] shall exercise general supervision over the operation and maintenance of public water systems throughout the state. . . . [including] all the features of operation and maintenance which do or may affect the quality or quantity of the water supplied."). Tennessee's water rights are clearly implicated, even if Mississippi has sued only Memphis. *Cf. Colorado v. Kansas*, 320 U.S. at 393 (noting that controversy between states over rightful shares of the Arkansas River "is not to be determined as if it were one between two private riparian proprietors or appropriators"); *Kansas v. Colorado*, 206 U.S. at 100 (noting the court must consider the effect that one state's increased share of water has on another state in order to determine amount of water each is entitled to from river).

Tennessee cannot be joined to this suit without depriving the district court of subject-matter jurisdiction because a suit between Mississippi and Tennessee for equitable apportionment of the Aquifer implicates the exclusive jurisdiction of the Supreme Court under 28 U.S.C. § 1251(a).

### *D. There Was No Abuse of Discretion in Dismissing the Suit*

Having concluded that Tennessee is a necessary party whose joinder would deprive the district court of subject-matter jurisdiction, we turn to whether the district court abused its discretion in dismissing the suit under Rule 19(b). When assessing the Rule 19(b) factors, the relevant inquiry is "whether, in equity and good conscience, the action should proceed among the

existing parties or should be dismissed." FED. R. CIV. P. 19(b); *see Pulitzer-Polster*, 784 F.2d at 1312 ("[W]e must assess the factors set out in Rule 19(b), seeking to avoid manifest injustice while taking full cognizance of the practicalities involved.").

We find no abuse of discretion in the district court's determination that Tennessee is an indispensable party and that in equity and good conscience the suit should be dismissed. Clearly a judgment rendered in Tennessee's absence would be enormously prejudicial to Tennessee's sovereign interest in its water rights. The specter of a determination of Tennessee's water rights without the its participation in the suit is itself sufficiently prejudicial to render the state an indispensable party. *Cf. Hinterlider*, 304 U.S. at 106-07 (noting that judicial apportionment of water from an interstate stream is binding on all water claimants from each state); *New Jersey v. New York*, 283 U.S. 336, 346 (1931) ("[A river] offers a necessity of life that must be rationed among those that have power over it. . . . Both States have real and substantial interests in the River that must be reconciled as best they may."). Further, there was no error in the district court's finding that it could not fashion restrictions in the judgment so as to avoid the threat of prejudice to Tennessee's sovereign interests or that a judgment rendered without Tennessee's participation would be inadequate. *Cf. Idaho v. Oregon*, 462 U.S. 1017, 1025 (1983) ("[W]henever . . . the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them. . . ."); *Colorado v. Kansas*, 320 U.S. at 392 ("The reason for judicial caution in

adjudicating the relative rights of states [to shares of interstate water] is that . . . they involve the interests of quasi-sovereigns, [and] present complicated and delicate questions. . . .").

Finally, Mississippi will have an adequate remedy despite this suit's dismissal. *See* 28 U.S.C. § 1251(a). In an equitable apportionment action, the Supreme Court might take one of several actions, such as concluding that the existing withdrawals of groundwater from the Aquifer in Tennessee are appropriate or limiting the total volume of Aquifer water that may be withdrawn by either party. *See Colorado v. Kansas*, 320 U.S. at 391; *New Jersey*, 283 U.S. at 346.[7]

## III. CONCLUSION

For the foregoing reasons we AFFIRM the judgment of the district court.

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[7] Of course, the parties might also negotiate an interstate compact allocating the resource going forward rather than continue litigation. *See Colorado v. Kansas*, 320 U.S. at 392 (encouraging the parties to seek a negotiated, political solution rather than requiring the Supreme Court to make a necessarily imperfect determination).

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**No. 08-60152**
**D.C. Docket No. 2:05-CV-32**

**[Filed June 5, 2009]**

| | |
|---|---|
| JIM HOOD, Attorney General, ex rel; STATE OF MISSISSIPPI, Acting for Itself and Parens Patriae for and on behalf of the People of the State of Mississippi | ) |
| Plaintiffs-Appellants | ) |
| v. | ) |
| THE CITY OF MEMPHIS, TENNESSEE; MEMPHIS LIGHT GAS & WATER DIVISION | ) |
| Defendants-Appellees | ) |

Appeal from the United States District Court
for the Northern District of Mississippi

Before HIGGINBOTHAM, BENAVIDES, and STEWART, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: JUN 29 2009

**A True Copy**
**Attest**

**Clerk, U.S. Court of Appeals, Fifth Circuit**
**By: /s/**
**Deputy**

**New Orleans, Louisiana JUN 29 2009**

## APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF MISSISSIPPI**
**DELTA DIVISION**

**No. 2:05CV32-D-B**

**[Filed February 6, 2008]**

| | |
|---|---|
| JIM HOOD, Attorney General, *ex rel.*, THE STATE OF MISSISSIPPI, acting for itself and *Parens Patriae* for and on behalf of the People of the State of Mississippi | ) |
| PLAINTIFF | ) |
| vs. | ) |
| THE CITY OF MEMPHIS, TENNESSEE; and MEMPHIS LIGHT, GAS & WATER DIVISION | ) |
| DEFENDANTS | ) |

BENCH OPINION DISMISSING ACTION WITHOUT PREJUDICE

The United States Supreme Court held, in Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 101-102 (1998), that Article III generally

requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case and that "for a court to pronounce upon [the merits] when it has no jurisdiction to do so is for a court to act *ultra vires*." See also Villarreal v. Smith, 201 Fed. Appx. 192, 194 (5th Cir. 2006) ("A federal court has the affirmative duty to inquire into jurisdiction whenever the possibility of a lack of jurisdiction arises."); Warren v. United States, 874 F.2d 280, 281-82 (5th Cir. 1989) (holding that "federal courts are under a continuing duty to inquire into the basis of jurisdiction ..."); Giannakos v. M/V Bravo Trader, 762 F.2d 1295, 1297 (5th Cir. 1985) ("United States District Courts . . . have the responsibility to consider the question of subject matter jurisdiction *sua sponte* . . . and to dismiss any action if such jurisdiction is lacking."); Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

***Discussion***

The Plaintiff initiated this action seeking past and future damages as well as equitable relief related to the Defendants' alleged wrongful appropriation of groundwater from the Memphis Sands Aquifer.

Although it is the Defendants that seek a ruling that the State of Tennessee is an indispensable party to this action, "when an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder." Pulitzer-Polster v. Pulitzer, 784 F.2d 1305, 1309 (5th Cir. 1986). Because the court has indicated that a possibly necessary party

is absent from this action, the burden of disputing joinder falls on the Plaintiff.

Rule 19(a) of the Federal Rules of Civil Procedure provides in part that:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

Rule 19(b) states that:

> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors a court should consider in determining whether a party is indispensable include: first, to what extent a judgment rendered in the person's absence

> might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

Under Rule 19, the court's analysis is conducted as follows:

> The court initially must determine whether the absent person's interest in the litigation is sufficient to satisfy one or more of the tests set out in the first sentence of Rule 19(a). There is no precise formula for determining whether a particular nonparty must be joined under Rule 19(a). Rather, the decision has to be made in terms of the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them. If joinder under Rule 19(a) is not feasible because, e.g., it will deprive the court of subject matter jurisdiction, the court must examine the four considerations described in Rule 19(b) to determine whether the action may go forward (without the absentee) or must be dismissed, the absent person being thus regarded as indispensable.

Faloon v. Sunburst Bank, 158 F.R.D. 378, 380 (N.D. Miss. 1994).

While there are apparently no reported cases dealing with interstate subsurface water or aquifers, it is admitted by all parties and revealed in exhibits that the Memphis Sands or Sparta aquifer lies under several States including the States of Tennessee and Mississippi.

In applying the dictates of Rule 19 to the facts of this case, the court holds that the State of Tennessee is a necessary and indispensable party. First, the doctrine of equitable apportionment has historically been the means by which disputes over interstate waters are resolved. The United States Supreme Court has held that it possesses a "serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States." Arizona v. California, 373 U.S. 546, 564 (1963); *see* Texas v. New Mexico, 462 U.S. 554, 567 (1983) (The Supreme Court held that "[t]here is no doubt that this court's jurisdiction to resolve controversies between two states . . . extends to a properly framed suit to apportion the waters of an interstate stream between States through which it flows . . .").

The subject aquifer in the case *sub judice* has not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court. However, absent apportionment, this court cannot afford relief to the Plaintiff and hold that the Defendants are pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer's water is the property of

which State. It is simply not possible for this court to grant the relief the Plaintiff seeks without engaging in a *de facto* apportionment of the subject aquifer; such relief, however, is in the original and exclusive jurisdiction of the United States Supreme Court because such a dispute is necessarily between the State of Mississippi and the State of Tennessee. Throughout the years, the Supreme Court has adjudicated many such disputes pursuant to its original and exclusive jurisdiction, including one between the States of Mississippi and Louisiana involving the Mississippi River. See, e.g., Louisiana v. Mississippi, 516 U.S. 22 (1995); Mississippi v. Louisiana, 506 U.S. 73 (1992); Virginia v. Maryland, 540 U.S. 56 (2003); Kansas v. Colorado, 514 U.S. 673 (1995); Nebraska v. Wyoming, 515 U.S. 1 (1995); Colorado v. New Mexico, 467 U.S. 310 (1984); Arizona v. California, 373 U.S. 546 (1963); New Jersey v. New York, 345 U.S. 369 (1953); Nebraska v. Wyoming, 325 U.S. 665 (1945); Connecticut v. Massachusetts, 282 U.S. 660 (1931); Kansas v. Colorado, 206 U.S. 46 (1907). In another analogous case, the Fifth Circuit held that the United States was an indispensable party in a suit filed by a Texas municipality and other individual landowners against several defendants who claimed irrigation rights to the Rio Grande River; while the Plaintiffs in that case did join the United States as a defendant, the Fifth Circuit held that sovereign immunity prevented joinder of the United States, but because it was a necessary and indispensable party and the suit could therefore not go forward without it as a party, the suit was dismissed. Miller v. Jennings, 243 F.2d 157 (5th Cir. 1957).

While this court, in initially denying the Defendants' motion seeking relief under Rule 19, relied

upon another Supreme Court case, Illinois v. City of Milwaukee, Wisconsin, 406 U.S. 91 (1972), for the proposition that a State need not be joined in a nuisance action brought by a neighboring State against cities and local commissions in that State and involving an interstate waterway, the court finds that cases such as Louisiana v. Mississippi are more closely analogous to the case *sub judice* because the partition of an interstate body of water is a necessary condition of affording the Plaintiff relief in this case. The case *sub judice* involves a proprietary or ownership interest in subsurface water. The Illinois v. City of Milwaukee, Wisconsin case did not involve a dispute over ownership of interstate water or any other property; the Louisiana v. Mississippi case, as well as other aforecited cases, did involve disputes over such ownership issues.

Turning to Rule 19(a)'s requirements, the court finds that Rule 19(a)(1) renders the State of Tennessee a necessary party because in its absence complete relief cannot be accorded among those already parties to the action. This is true because to afford the State of Mississippi the relief sought and to hold that the Defendants have misappropriated Mississippi's water from the Memphis Sands aquifer, the court must necessarily determine which portion of the aquifer's water belongs to Mississippi, which portion belongs to Tennessee, and so on, thereby effectively apportioning the aquifer. Mississippi cannot be afforded any relief otherwise. The court also notes that, while the Plaintiff contends on the one hand that only Mississippi water is involved in this suit, it also contends that the sole basis for the court's jurisdiction is the existence of a federal question because interstate water is the subject of the suit. The Plaintiff cannot

have it both ways. The court also notes that diversity jurisdiction is not possible in this case because the Plaintiff State of Mississippi brings this suit on its own behalf and it is clear that a State is not a citizen of itself and therefore cannot sue or be sued in federal court on the basis of federal diversity jurisdiction. Moor v. County of Alameda, 411 U.S. 693 (1973).

However, joinder of the State of Tennessee as a party to this suit is not possible because this court is without jurisdiction to hear such a dispute. As noted previously, original and exclusive jurisdiction of all controversies between two or more States is vested in the United States Supreme Court. See 28 U.S.C. § 1251. Thus, the court must also examine the dictates of Rule 19(b) and determine whether, in equity and good conscience, this action should proceed among the parties before it, or should be dismissed, with the State of Tennessee being thus regarded as indispensable. The court will examine Rule 19(b)'s four considerations in turn.

First, the court must consider to what extent a judgment rendered in Tennessee's absence might be prejudicial to Tennessee or to those already parties to this action. The court holds that a judgment in this matter rendered in the absence of Tennessee will be acutely prejudicial to Tennessee's interests. As the Supreme Court has noted, no single State is permitted to impose its own policy choices on neighboring States. BMW of North Am., Inc. v. Gore, 517 U.S. 559, 572 (1996); *see* Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143, 149 (1934) (holding that a State "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of [a neighboring State]."). In effect, a judgment

adverse to the Defendants in this case, prior to apportionment of the subject aquifer (which can only occur via agreement by the impacted States or by the Supreme Court), would determine the rights of the State of Tennessee and its citizens to the valuable water resources in the subject aquifer, without Tennessee having been a party to this action. Thus, the court finds that a judgment rendered in Tennessee's absence in this case would be prejudicial to Tennessee.

Second, the court is unaware of any means by which, via protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice to Tennessee can be lessened or avoided. To afford any relief to the Plaintiff of necessity requires apportionment of the subject aquifer, thereby causing great prejudice to Tennessee.

Third and fourth, a judgment rendered in Tennessee's absence will not be adequate given the factors previously discussed by the court; however, the Plaintiff in this matter will certainly have an adequate remedy if this action is dismissed for nonjoinder. As noted above, original and exclusive jurisdiction over disputes of this type are vested in the United States Supreme Court, which has typically in the past assigned these disputes to a Special Master, who then makes proposed findings of fact and conclusions of law to the Supreme Court, which subsequently renders a decision in the case. This court's decision today in no way ends this dispute or renders the State of Mississippi without its day in court. While the Supreme Court has stated that "where possible, States [should] settle their controversies by mutual accommodation and agreement," if such a resolution is

not possible in this case, a well-established means exists for Mississippi to petition the Supreme Court for apportionment of the waters of the Memphis Sands aquifer in a suit that properly joins all necessary and indispensable parties, including the State of Tennessee. See, e.g., Louisiana v. Mississippi, 516 U.S. 22 (1995); Mississippi v. Louisiana, 506 U.S. 73 (1992); Kansas v. Colorado, 206 U.S. 46 (1907).

Given the foregoing, the court hereby finds that the State of Tennessee is a necessary and indispensable party to this action pursuant to Rule 19 of the Federal Rules of Civil Procedure. Because the joinder of Tennessee is not possible in this court, the court hereby determines that in equity and good conscience this action should be dismissed without prejudice, with the State of Tennessee being regarded by the court as indispensable.

While the court makes no formal determination in its opinion today regarding the necessity or indispensability of the State of Arkansas to this action, the court is of the opinion that Arkansas (via its current Attorney General) should be put on notice of the pendency of this action and any future action filed in the Supreme Court.

This opinion is appealable to the United States Court of Appeals for the Fifth Circuit. The court directs that all submissions to this court be included in and made a part of the record in this case.

A separate order in accordance with this bench opinion shall issue this day.

This the 4th day of February 2008.

/s/ Glen H. Davidson
Senior Judge

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT**
**OF MISSISSIPPI**
**DELTA DIVISION**

**No. 2:05CV32-D-B**

**[Filed September 25, 2007]**

JIM HOOD, Attorney General, *ex rel.*,
THE STATE OF MISSISSIPPI, acting
for itself and *Parens Patriae* for and on
behalf of the People of the State of
Mississippi

PLAINTIFF

vs.

THE CITY OF MEMPHIS, TENNESSEE; and
MEMPHIS LIGHT, GAS & WATER DIVISION

DEFENDANTS

ORDER DENYING MOTION FOR
JUDGMENT ON THE PLEADINGS
AND DENYING MOTIONS
FOR PARTIAL SUMMARY JUDGMENT

Presently before the court is the Defendants' motion for judgment on the pleadings and three separate motions for partial summary judgment as to damages prior to 1988, conversion, and prejudgment interest. Upon due consideration, the court finds that the motions should be denied.

The Plaintiff initiated this action seeking past and future damages as well as equitable relief related to the Defendants' alleged wrongful appropriation of groundwater from the Memphis Sands Aquifer, which belongs to the State of Mississippi. The Defendants have now filed the pending motions, one for judgment on the pleadings and three separate motions for partial summary judgment as to damages prior to 1988, conversion, and prejudgment interest. The Plaintiff opposes the motions.

Rule 12(c) provides that any party may move for judgment on the pleadings after the pleadings are closed but within such time as not to delay the trial. Fed. R. Civ. P. (12)(c). Rule 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noted facts." Herbert Abstract Co. v. Touchstone Props., Ltd., 914 F.2d 74, 76 (5th Cir. 2001). The central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief. Hughes v. Tobacco Inst., Inc., 278 F.3d 417, 420 (5th Cir. 2001). The standard for a motion to dismiss under Rule 12(c) is the same as for a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 313 (5th Cir. 2002); Jones v. Greninger, 188 F.3d 322, 324 (5th Cir.

1999). Thus, the court must accept all factual allegations in the complaint as true and take them in the light most favorable to the Plaintiff. Erickson v. Pardus, --- U.S. ----, 127 S.Ct 2197, 2200 (2007); Christopher v. Harbury, 536 U.S. 403, 406 (2002). A complaint must simply contain a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Bell Atl. Corp. v. Twombly, --- U.S. ----, 127 S.Ct. 1955, 1964 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint does not need detailed factual allegations, but a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not suffice. Id. at 1965 (citations omitted); Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498 (5th Cir. 2000). The factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations in the complaint are true (even if doubtful in fact). Bell Atl. Corp., 127 S.Ct. at 1965.

As noted above, in ruling on a Rule 12(c) motion, the court will accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. Jones, 188 F.3d at 324 (5th Cir. 1999). In deciding whether to grant a 12(c) motion, the issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. Jones, 188 F.3d at 324. Judgment on the pleadings is appropriate only if material facts are not in dispute and questions of law are all that remain. Fed. R. Civ. P. 12(c); Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 891 (5th Cir. 1998).

Given the stringent standard noted above, the court finds in this case that the Defendants' motion for judgment on the pleadings should be denied. As the court noted in previous orders denying motions to dismiss filed by the Defendants, a plethora of material facts are in dispute in this case and judgment on the pleadings is simply not appropriate. Accordingly, the Defendants' present motion for judgment on the pleadings is denied.

As for the Defendants' motions for partial summary judgment, the court finds that genuine issues of material fact exist at the present juncture which preclude the entry of partial summary judgment as to damages prior to 1988, conversion, and prejudgment interest. Further, the court has the discretion, which it exercises here, to allow the subject claims to proceed to trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986) ("Neither do we suggest ... that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.").

THEREFORE, it is hereby ORDERED that the Defendants' motion for judgment on the pleadings and three separate motions for partial summary judgment as to damages prior to 1988, conversion, and prejudgment interest (docket entries 186, 224, 226, and 232) are DENIED.

SO ORDERED, this the 24th day of September 2007.

/s/ Glen H. Davidson
Senior Judge

## APPENDIX D

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT**
**OF MISSISSIPPI**
**DELTA DIVISION**

**No. 2:05CV32-D-B**

**[Filed September 13, 2005]**

JIM HOOD, Attorney General, *ex rel.*, THE STATE OF MISSISSIPPI, acting for itself and *Parens Patriae* for and on behalf of the People of the State of Mississippi

PLAINTIFF

vs.

THE CITY OF MEMPHIS, TENNESSEE; and MEMPHIS LIGHT, GAS & WATER DIVISION

DEFENDANTS

ORDER DENYING MOTION TO ALTER OR AMEND

Presently before the court is the Defendants' motion to alter or amend the court's August 8, 2005, order denying the Defendants' motion to dismiss. Upon due consideration, the court finds that the motion,

which is in essence a motion to reconsider, should be denied.[1]

On February 1, 2005, the Plaintiff initiated this action seeking past and future damages as well as equitable relief related to the Defendants' alleged wrongful appropriation of groundwater from the Memphis Sands Aquifer, which belongs to the State of Mississippi. Thereafter, the Defendants filed a motion to dismiss, which the court denied on August 8, 2005. In the present motion, filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the Defendants seek to have the court reconsider its decision, and alter or amend its August 8, 2005, order.

Rule 60 of the Federal Rules of Civil Procedure allows relief from a judgment or order for various reasons, including clerical errors, newly discovered evidence, fraud, or "any other reason justifying relief from the operation of the [order]." Fed. R. Civ. P. 60(b). Here, the Defendants have requested relief solely on the basis that they disagree with the court's prior ruling, and they insist that they are in fact entitled to a dismissal of the Plaintiff's claims.

It was only after careful consideration of the parties' submissions that the court entered its order

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[1] The Defendants also request that the court certify the issues presented in this motion for interlocutory appeal, pursuant to 28 U.S.C. §1292(b). The court finds, however, that these issues do not involve any controlling questions of law as to which there is substantial ground for difference of opinion. As such, the court finds that its denial of the Defendants' motion to dismiss does not present issues of sufficient magnitude so as to warrant an interlocutory appeal.

denying the Defendants' motion to dismiss. In the present motion to alter or amend, the Defendants do not assert any new arguments, facts or case law that would give the court any reason to modify its prior ruling in any respect. As such, the court is satisfied that its prior ruling is not in error, and the court declines to alter or amend that ruling.

THEREFORE, it is hereby ORDERED that the Defendants' motion to alter or amend (docket entry 48) is DENIED.

SO ORDERED, this the 12th day of September 2005.

/s/ Glen H. Davidson
Chief Judge

## APPENDIX E

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT**
**OF MISSISSIPPI**
**DELTA DIVISION**

**No. 2:05CV32-D-B**

**[Filed August 9, 2005]**

| | |
|---|---|
| JIM HOOD, Attorney General, ex rel., THE STATE OF MISSISSIPPI | ) |
| PLAINTIFF | ) |
| VS. | ) |
| THE CITY OF MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION | ) |
| DEFENDANTS | ) |

ORDER DENYING MOTION TO DISMISS

Presently before the Court is the Defendants' motion to dismiss. Upon due consideration, the Court finds that the motion should be denied.

The Plaintiff initiated this action seeking past and future damages as well as equitable relief related to

the Defendants' alleged wrongful appropriation of ground water from the Memphis Sands Aquifer which belongs to the State of Mississippi. The Defendants challenge the complaint on a variety of legal grounds none of which the Court finds persuasive. The Court has carefully reviewed the parties comprehensive briefs and finds that the Plaintiff does have standing and the claims are ripe, the State of Tennessee is not an indispensable party, this Court does have subject matter jurisdiction and venue is proper. Thus, the Defendants' motion to dismiss shall be denied in all respects.

THEREFORE, it is hereby ORDERED that the Defendants' motion to dismiss (docket entry 21 shall be DENIED.

SO ORDERED, this the 8th day of August 2005.

/s/ Glen H. Davidson
Chief Judge

## APPENDIX F

### CONSTITUTION OF THE UNITED STATES OF AMERICA ARTICLE III. JUDICIAL POWER

U.S. Const. Art. III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be

held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

## UNITED STATES CODE
## TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
## PART IV. JURISDICTION AND VENUE
## CHAPTER 81. SUPREME COURT

28 U.S.C.§ 1251. Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

# MISSISSIPPI CODE of 1972 ANNOTATED
# TITLE 51. WATERS, WATER RESOURCES, WATER DISTRICTS, DRAINAGE, AND FLOOD CONTROL
# CHAPTER 3. WATER RESOURCES; REGULATION AND CONTROL
# ARTICLE 1. GENERAL PROVISIONS

Miss. Code Ann. § 51-3-1. Declaration of policy on conservation of water resources

It is hereby declared that the general welfare of the people of the State of Mississippi requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, that the waste or unreasonable use, or unreasonable method of use, of water be prevented, that the conservation of such water be exercised with the view to the reasonable and beneficial use thereof in the interest of the people, and that the public and private funds for the promotion and expansion of the beneficial use of water resources shall be invested to the end that the best interests and welfare of the people are served.

It is the policy of the Legislature that conjunctive use of groundwater and surface water shall be encouraged for the reasonable and beneficial use of all water resources of the state. The policies, regulations and public laws of the State of Mississippi shall be interpreted and administered so that, to the fullest extent possible, the ground and surface water resources within the state shall be integrated in their use, storage, allocation and management.

All water, whether occurring on the surface of the ground or underneath the surface of the ground, is

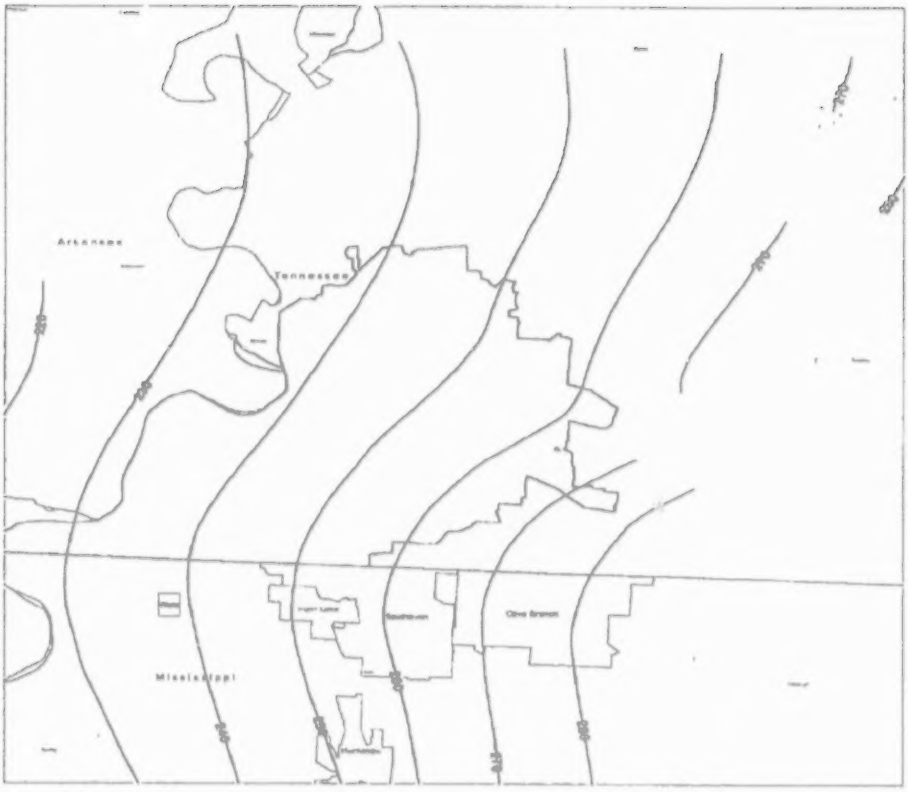
hereby declared to be among the basic resources of this state to therefore belong to the people of this state and is subject to regulation in accordance with the provisions of this chapter. The control and development and use of water for all beneficial purposes shall be in the state, which, in the exercise of its police powers, shall take such measures to effectively and efficiently manage, protect and utilize the water resources of Mississippi.

## APPENDIX G

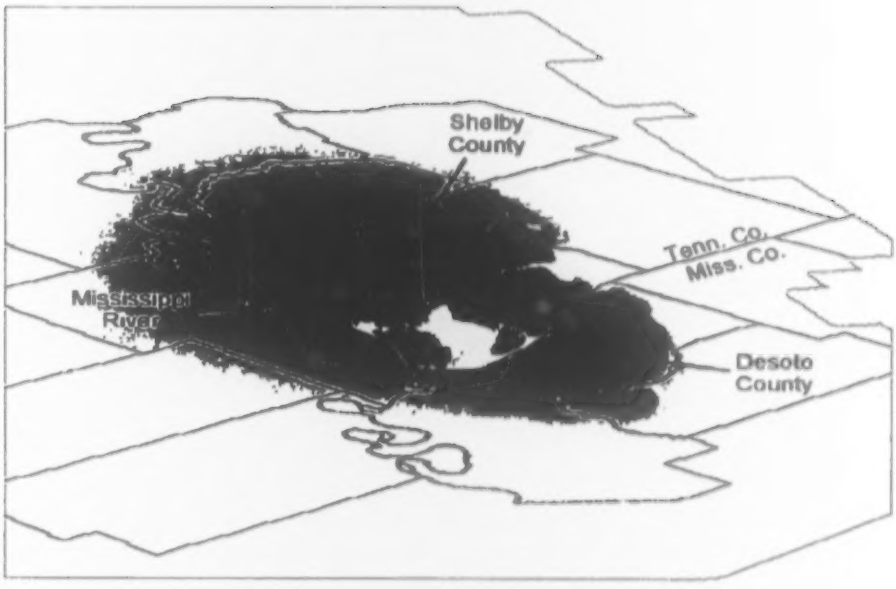
[SEE THE FOLLOWING PAGES]

Explanatory Note: The figure to the right is a ground water flow model-computed potentiometric surface of the Memphis Sand or Sparta Aquifer prior to 1886, which is considered to represent pre-development or pre-pumping conditions. It shows that the pre-development ground water flow direction of the Aquifer was from east to west toward the Mississippi River. Potentiometric surface is the ground water level to which water in an aquifer will rise in a tightly cased water well. Potentiometric surface maps illustrate the ground water gradient across a given area. Potentiometric surface maps also provide information regarding ground-water gradient or flow direction which is always perpendicular to contours. In the figure, it is clear that there is no cone of depression under pre-development conditions. The ground water in the aquifer underlying northern Mississippi moved from east to west as may be demonstrated by flow lines drawn perpendicular to the depicted contours on the potentiometric surface map. None of the ground water involved in Mississippi's action would have ever naturally flowed into Tennessee.

45a


Arkansas
Tennessee
Mississippi
Alabama
Georgia
Louisiana
Florida
Atlantic Ocean
Gulf of Mexico

Explanatory Note: Commencing in 1886, MLGW's pumpage and withdrawal of aquifer groundwater disturbed its steady-state condition and created a dynamic flow condition, thus altering the aquifer ground-water system. These circumstances created the cone of depression under Memphis that expands deeply into Mississippi. A three-dimensional illustration of the cone would resemble the image shown to the right. In the pre-development steady-state condition of the aquifer, there was continual inflow (recharge) of water in the aquifer so that there was always a constant volume of water physically present under Mississippi, and more particularly Desoto County. The water levels of this constant volume have varied over time depending on stresses on the aquifer such as MLGW's pumping. There are a number of components that make up the aquifer water inventory or "budget"as it is defined in hydrogeological terms. These include recharge, changes in storage, ground-water in-flow and out-flow, and other factors. When a stress such as MLGW's pumpage is introduced to the system, it creates a cone of depression that gradually reaches out further and further to draw in more water to maintain the ground-water supply for MLGW's wells. The ground-water system in the Desoto County area was, prior to MLGW pumpage, in a steady-state condition.

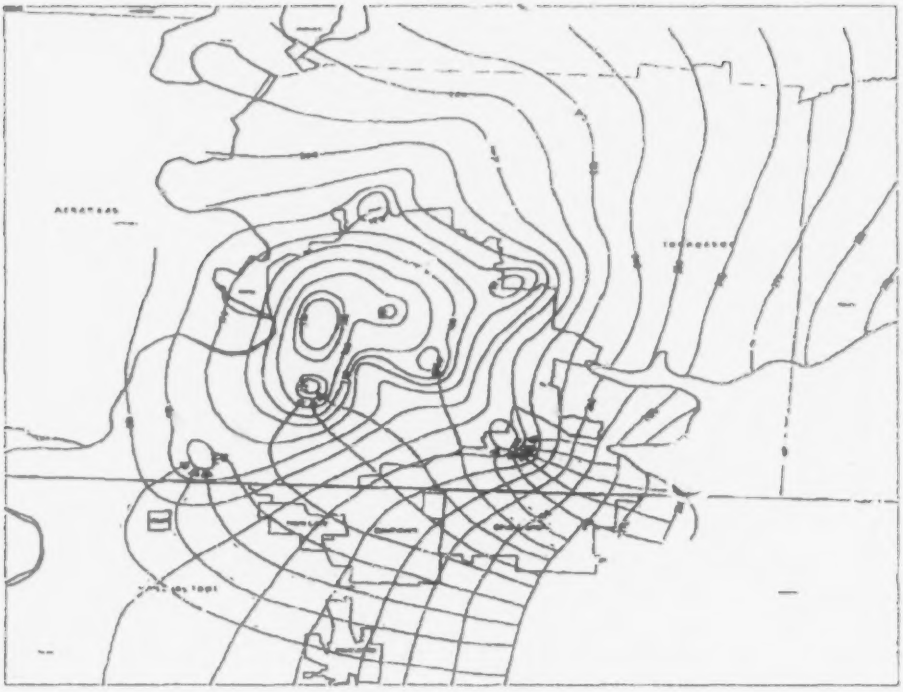

Shelby
County
Tenn. Co.
Miss. Co.
Mississippi
River
Desoto
County

Explanatory Note: A cone of depression is a pattern that forms when a pumping well pumps from an aquifer, in this case a confined aquifer. When a large cone forms in a confined aquifer, the water levels decline due to pumping and there is an increase in hydraulic gradient which in turn alters and controls ground water velocity and direction of flow. The shape and extent or size of the cone depends on the rate and duration of pumping, and the hydraulic properties of the aquifer (groundwater system). It begins to form a funnel-shaped vortex in the potentiometric surface of the aquifer, as shown (for illustration purposes only) in the hydrogeologic cross-section to the right.

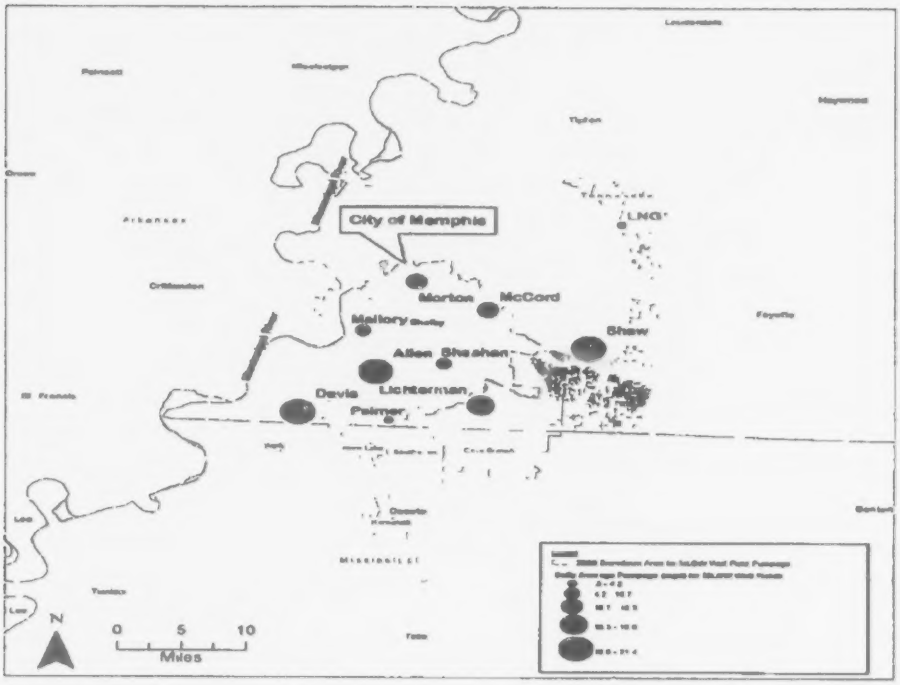
BEST AVAILABLE COPY

Explanatory Note: MLGW's pumping operations have diverted the aquifer's ground water movement from its natural westerly direction to a true northward accelerated flow path toward the steepest part of the cone which underlies Memphis. As a result, MLGW's pumpage has been and is now capturing aquifer ground water beneath Mississippi. The illustration to the right demonstrates how MLGW's ground water pumpage has altered the natural flow gradient and rate, causing Mississippi's water to move northward. The curved lines on the illustration, called "potentiometric contours," depict the configuration and expansive geographic scope of the cone. The illustration is a "flow net," a graphical representation of the ground-water flow system consisting of a set of equipotential lines (i.e., the contour lines of the aquifer's potentiometric surface as defined by measured water levels) and corresponding flow lines. Flow net analysis is a standard hydrologic method used to calculate ground-water flow volumes, in this instance driven by the cone from within Mississippi northward into Memphis. Flow lines define the direction of ground-water movement resulting from the pumping stress imposed by MLGW on the aquifer beneath Mississippi. The red arrows, or "flow lines" on the flow net illustration to the right show how the cone causes Mississippi's aquifer ground water to actually change direction from its normal east to west course of movement as it is drawn into a true north pathway directly into the smaller contours representing MLGW's southernmost well fields.

51a



Explanatory Note: Memphis and MLGW have never disputed either the existence of the huge cone caused by their pumping or its past and continuing effects on Mississippi's ground water resources. The cone results from cumulative ground water pumping from multiple wells in numerous well fields operated by MLGW for Memphis' municipal supply and sales. Essentially, many smaller individual well cones of depression overlap forming one, expansive cone of depression with broad geographical impact. The area of this large cone, occurring from MLGW's cumulative well field pumpage, is depicted in yellow on the graphic representation shown to the right. Due to demand and growth of MLGW's system, the aquifer has been pumped and drawn down at a higher rate than it is being recharged or replenished, causing water levels to drop and creating the cone of depression expanding outward from Memphis across the border into Desoto County, Mississippi.


City of Memphis
LNG
Morton
McCord
Mallory
Shaw
Allen
Shushan
Davis
Lichterman
Palmer
N
0 5 10
Miles

# APPENDIX H

Examples of Decisional Law, Legislative Enactments and Constitutional Provisions of Various States Declaring State-Ownership and Control of Water Resources as a Function of Statehood and Inherent Sovereignty and Examples of Federal and State Studies Confirming the Diversion of Mississippi's Ground Water by Memphis-MLGW

A. Examples of Reported Decisions Confirming "State-Ownership" of Water Resources

- *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988) (affirming *Cinque Bambini Partnership v. State of Mississippi*, 491 So.2d 508, 511-14, 516-17 & 519-20 (1986) (effective upon statehood, on March 1, 1817, the United States granted to Mississippi in trust all water and other resources within the State's territorial boundaries);

- *National Audubon Society v. The Superior Court of Alpine County*, 658 P.2d 709, 724, 727-28 (Calif. 1983) (all water within state is property of people of the state; state, as sovereign, retains control of waters)

- *Chatfield East Well Co., Ltd. v. Chatfield East Property Owners,* 956 P.2d 1260 (Colo. 1998) (all surface and ground water is a public resource)

- *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935) (waters of

the public domain are *publici juris*, subject to plenary control of the states);

- *Monte Vista Canal Co. v. Centennial Irrigating Ditch Co.*, 123 P.831 (Colo. App. 1912) (ultimate title or ownership of water of state is vested in public);

- *Bennett v. Twin Falls North Side Land and Water Co.*, 150 P. 336, 338-39 (Idaho 1915) (ownership of the corpus of the water is in the state);

- *State Game & Fish Comm'n v. Louis Fritz Co.*, 187 Miss. 539, 193 So. 9 (1940) (State is the owner of water within its borders and incident to this ownership is right and duty to protect and conserve it under State's police powers connected with its ownership of water in trust for the people);

- *State, ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44 (1938) (State has power, as trustee, to bring trespass action to recover value of subterranean resources removed from river bed);

- *Ex parte Louis Fritz*, 86 Miss. 210, 38 So. 722, 723 (1905) (ownership of *ferae naturae* is in the state in its sovereign capacity; state has right and duty to preserve and protect public resources from trespassers);

- *Barry v. Merickel Holding Corp.*, 108 P.2d 311, 314-15 (Nev. 1940) (all water of state, whether above or beneath the surface of the ground, belongs to state; water being state property, the state has the right and power to prescribe how it may be used);

- *Johns-Manville Sales Corp. v. New Jersey Water Supply Auth.*, 211 N.J. Super. 315, 511 A.2d 1194, 1195-97 (1986) (water resources are public assets held by state; ultimate ownership of state of precious natural resources is held by state for public's use);

- *New Mexico v. City of Las Vegas*, 89 P.3d 47, 61 (N.M. 2004) (all water within state belongs to state);

- *State v. Erickson*, 308 P.2d 983 (N.M. 1957) (all water within the state, whether above or beneath the surface of the ground, belongs to the state; the state as owner has right to prescribe how water may be used);

- *State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421 (N.M. 1945) (water held to belong to public);

- *United Plainsmen Ass'n v. North Dakota State Water Conserv. Comm'n*, 247 N.W.2d 457, 461 (N.D. 1976) (all streams and natural water courses shall forever remain property of state; all water within limits of state held by state by virtue of its sovereignty);

- *Parks v. Cooper*, 676 N.W.2d 823, 838 (S.D. 2008) ("we align ourselves with the Idaho, Iowa, Minnesota, New Mexico, Montana, North Dakota, Oregon, Utah and Wyoming decisions that have recognized the public trust doctrine's applicability to state waters").

- *Murphy v. Kerr*, 296 F.536 (D.N.M. 1923) (Court noted that Arizona, Colorado, California, Montana, Nevada, New Mexico, Oklahoma, Oregon, North Dakota, South Dakota, Texas, Utah, Wyoming and Idaho have declared that "all waters within the state are the property of the public, and belong to the state").

B. Examples of Legislative Enactments Declaring "State-Ownership" of Water Resources

- Alabama's "Water Resources Act," ALA. CODE ANN. §9-10B-1 (all waters of the state, above or below surface of ground, are the resources of state);

- Arizona's "Groundwater Management Act," ARIZONA STAT. §45-401 (groundwater of state made subject to state management and regulation);

- Arkansas' "Ground-water Protection and Management Act" §15-22-302 (mandate for reporting use of ground water to state);

- Delaware's "Natural Resources-Environment Control" Law, DEL. CODE ANN. Tit. 7, §6001 (the state, in the exercise of its sovereign power, controls development and use of land and water resources of state);

- Florida's "Water Resources Act," FLA. STAT. ANN. §373.016 (waters of state are its basic resources controlled by state for benefit and use of public);

- Georgia's "Ground-Water Use Act," GA. CODE ANN. §12-5-91 (the water resources of the state are to be regulated in public interest);

- Indiana's "Waters Rights; Ground Water" Law, IND. CODE ANN. §14-25-3-4 (ground water resources of state protected and regulated for citizens' beneficial use);

- Iowa's "Resources Enhancement and Protection" Law, IOWA CODE ANN. §455A.16 (state's natural resources subject to state protection);

- Kentucky's "Geology and Water Resources" Law, KY. REV. STAT. ANN. §151.120 (water occurring in any stream, lake, ground water, or subterranean water in Commonwealth is declared to be a natural resource and public water of the Commonwealth subject to control and regulation for the public);

- Minnesota's "Water Policy," MINN. STAT. ANN. §103A.201 (public waters are subject to control of the state);

- Mississippi's "Omnibus Water Rights Act," MISS. CODE ANN. §51-3-1 (all water, whether occurring on the surface of the ground or beneath it, is among the basic resources of Mississippi; the State, in the exercise of its police powers (derived from the public trust), has control of development, management and use of water in the State);

- New Jersey's "Waters and Water Supply Management" statutes, N.J. STAT. ANN. §58:1A-2 (water resources of state are public assets of state held in trust for people);

- New York's "Water Resources Law," N.Y. ENVTL. CONSERV. LAW §15-0103 (sovereign power to regulate and control water resources of state "ever

since its establishment has been and now is vested exclusively in the state");

- South Carolina's "Groundwater Use and Reporting Act," S.C. CODE ANN. §49-5-20 (groundwater resources of the state subject to regulation to protect resources and maintain conditions for use by public);

- Tennessee's "Water Quality Control Act," TENN CODE ANN. §69-3-102 (the waters of Tennessee are the property of the state and are held in the public trust for the use of the people of the state);

- Virginia's "Water Policy" Law, VA. CODE ANN. §62.1-11 (state's waters are natural resource regulated, controlled and protected by Commonwealth in exercise of its police powers).

C. Examples of Eastern States Adopting Regulated Riparianism Predicated on State Ownership of Water Resources

- States that have active regulated riparian systems and the approximate date of that adoption are as follows: Alabama (1993); Arkansas (1957); Connecticut (1982); Delaware (1959); Florida (1972); Georgia (1977); Hawaii (1987); Iowa (1957); Kentucky (1966); Maryland (1957); Massachusetts (1985); Minnesota (1973); **Mississippi (1985)**; New Jersey (1965); North Carolina (1973); New York (1979); Virginia (1989); and Wisconsin (1957). *Compare* MISS. CODE ANN. §51-3-1 (1985 & Supp. 2006) *with* ALA. CODE §9-10B-2; CONN. GEN. STAT. ANN. §22a-366; DEL. CODE ANN. TIT. 7, §6001; FLA. STAT. ANN. §373.016; GA. CODE ANN. §§12-5-21, 12-

5-91; HAW. REV. STAT. §174C-2(A); IND. CODE ANN. §13-12-1-8; IOWA CODE ANN. §455B.262(3); KY. REV. STAT. ANN. §151.110; MD. CODE ANN. NAT. RES. §8-801(1); MINN. STAT. ANN. §105.38; N.J. STAT. ANN. §58:1A-2; N.Y. ENVTL. CONSERV. LAW §§15-0103, 15-0105(1); N.C. GEN. STAT. §143-215.12; VA. CODE ANN. §62.1-11; VA. CODE ANN. §62.1-44.36, 62.1-44.84; and WIS. STAT. ANN. §144.25(1). *See also* American Society of Civil Engineers, "Regulated Riparian Model Water Code," Section 1-R-1-01 at 1 (2004) ("the waters of the State are a natural resource owned by the State in trust for the public and subject to the State's sovereign power to plan, regulate and control the withdrawal and use of those waters").

D. Examples of State Constitutional Provisions and Other Statutes Confirming State-Ownership of Water Resources

- Wyoming Constitution, Article 8, Section 1 (declares that "the water of all natural streams, springs, lakes or collection of still water within the boundaries of the state are . . . the property of the state.");

- Colorado Constitution, Article XVI, Section 5 (declares that "the water of every natural stream, not heretofore appropriated, within the State of Colorado, is declared to the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriate as hereinafter provided.");

- Montana Constitution, Article IX (declares that all water within the state, including underground

water, is the property of the state, and that all its use is a "public use" notwithstanding its user or purpose.);

- New Mexico Constitution, Article XVI, Sections 1, 2 (declares that all the "water of every natural stream, perennial or torrential, within the state" unappropriated at the time of statehood, "belong(s) to the public.");

- California Constitution, Article 10, Section 5 (provides that "the use of all water" by appropriation is a "public use" and subject to the regulation and control of the state.");

- Nevada Revised Statutes, 533.125 (provides that "the water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public");

- North Dakota Century Code, §61-01-01 (declares both surface and ground water to "belong to the public");

- Utah Code, §73-1-1 (declares that all waters in the state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof");

- Oregon Revised Statutes 537.110 (provides that all waters of the state, whether above or below the ground, are the property of the public);

- Nebraska Revised Statutes §46-202(1) (provides that the water of every natural stream not heretofore appropriated within the State of

Nebraska, including the Missouri River, is hereby declared to be the property of the public and is dedicated to the use of the people of the state, subject to appropriation);

- Washington's Legislation set forth in RCW §90.03.010 (provides that all waters within the state belong to the public);

- Idaho Code §42-101 (declares that all its water resources belong to the state);

- California Water Code, Section 1201 (provides that surface waters are "public waters of the state");

- Texas Water Code §11.021 (declares that surface water is the "property of the state").

E. Scientific Reports. Studies and reports prepared by the United States Geological Survey ("USGS") during the 1960's, 1970's, 1980's, 1990's, and in this decade, and the University of Memphis Ground Water Institute ("GWI") during the 1990's and currently, with funding from and in cooperation with MLGW and Memphis, have confirmed the existence of the cone of depression and the fact that it extends into, diverts and captures ground water from beneath Mississippi. These scientific reports include:

- Gerald K. Moore, *Geology and Hydrology of the Claiborne Group in Western Tennessee*: U.S. Geological Survey Water-Supply Paper 1809-F (1965) (Moore reported that, under conditions of heavy pumping in Memphis, 25 million gallons per day of aquifer ground water were being diverted

from Mississippi into Shelby County as early as 1960);

- D. D. Graham & W. S. Parks, *Potential for Leakage Among Principal Aquifers in the Memphis Area, Tennessee*: U.S. Geological Survey Water-Resources Investigations Report 85-4295 (1986) (Graham studied early potentiometric surface maps from 1886, 1960, 1970 and 1975 (appearing in work by USGS scientists, Criner & Parks, 1976) for the purpose of demonstrating that the cone of depression caused by pumping in the Memphis area extended across the Tennessee-Mississippi line into Desoto County, Mississippi);

- John V. Brahana & R. E. Broshears, *Hydrogeology and Ground-Water Flow in the Memphis and Fort Pillow Aquifers in the Memphis Area, Tennessee*: Water Resources Investigations Report 89-4131 (2001) (Brahana, a long-time consulting expert for Memphis and MLGW, reported that, as of 1980, withdrawals were 200 million gallons a day in the Memphis area and that Memphis' pumpage had altered the pre-pumping flow of the aquifer, effectively capturing most of the water flowing through it, including ground water from northwest Mississippi, primarily Desoto County);

- James Kingsbury, *Altitude of the Potentiometric Surface, September 1990, and Historical Water-Level Changes in the Memphis Aquifer in the Memphis Area, Tennessee* (1990) (map depicts cone of depression as extending across the Shelby County-Desoto County border into Mississippi);

- W. S. Parks & J. K. Carmichael, *Altitude of Potentiometric Surface, Fall 1985, and Historic Water-Level Changes in the Memphis Aquifer in Western Tennessee,* U.S. Geological Survey Water-Resources Investigations Report 88-4180 (1990a) (Parks and Carmichael found significant declines in the water levels in the aquifer for the period 1928-1983);

- J. Kerry Arthur & R. E. Taylor, *Definition of the Geohydrologic Framework and Preliminary Simulation of Ground-Water Flow in the Mississippi Embayment Aquifer System, Gulf Coastal Plain, United States*: U.S. Geological Survey Water-Resources Investigation Report 86-4364 (1990) (regional ground water model demonstrated the change in the natural east to west aquifer flow path and gradient to a northern direction into the cone of depression created by pumpage in Memphis; Arthur concluded that, as of 1980, approximately 30% of MLGW's water supply was being derived from the ground water system beneath Mississippi);

- J. Outlaw, *A Ground Water Flow Analysis of the Memphis Sand Aquifer in the Memphis, Tennessee, Area,* University of Memphis Ground-Water Institute (1994) (GWI concluded that the majority of the water withdrawn by the municipal well fields in Shelby County originates in the eastern part of Shelby County, Fayette County, Tennessee, and Desoto and Marshall Counties, Mississippi, as a result of the regional cone of depression extending into northwest Mississippi).